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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

NO. _____

IN THE SUPREME COURT OF TEXAS

In re Academy, Ltd. d/b/a Academy Sports + Outdoors,

Relator.

Relating to Trial Court Causes (Combined for Pretrial Matters)

No. 2017CI23341; In the 224th Judicial District Court of Bexar County, Texas;

No. 2018CI14368; In the 438th Judicial District Court of Bexar County, Texas;

No. 2018CI23302; In the 408th Judicial District Court of Bexar County, Texas;

No. 2018CI23299; In the 285th Judicial District Court of Bexar County, Texas.

PETITION FOR WRIT OF MANDAMUS

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STATEMENT REGARDING ORAL ARGUMENT

Relator Academy, Ltd. d/b/a Academy Sports + Outdoors requests the opportunity to participate in oral argument on the important issues of first impression presented in this petition. Merits briefs and oral argument will assist the Court in deciding whether Plaintiffs' state law claims are barred by unambiguous Congressional mandate.

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STATEMENT REGARDING MANDAMUS RECORD

Academy, Ltd. d/b/a Academy Sports + Outdoors is separately filing a sworn mandamus record in support of this petition for writ of mandamus. TEX. R. APP. P. 52.7(a)(1). References to the mandamus record, which is consecutively paginated, are in the form "MR at [MR Page#]." Because this proceeding involves four separate lawsuits that were consolidated for pretrial purposes, to avoid duplication Academy has included in the record only one copy of each relevant pleading that was filed in all four cases after the consolidation.

Selected materials from the mandamus record are attached in the Appendix to this petition as required or appropriate.[1] *See* TEX. R. APP. P. 52.3(k). References to exhibits in the Appendix are in the form "App. Tab __ at [MR page#]." The trial court held hearings on January 31, 2019 and March 19, 2019, on the motions for summary judgment and for permissive interlocutory appeal, respectively, and its denials of the motions are at issue in this proceeding. Transcripts of the hearings are included in the mandamus record as Exhibits 16 and 27, respectively. No testimony was adduced at these hearings. TEX. R. APP. P. 52.7(a)(2).

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[1] Two recent court documents, which are not part of the Mandamus Record, are included at Tabs M and N, respectively. Academy asks the Court to take judicial notice of these court orders: 1) the Fourth Court of Appeals' Order and Per Curiam Opinion denying Academy's Petition for Writ of Mandamus on May 22, 2019, in this proceeding; and 2) Judge Xavier Rodriguez's Order on Motion to Dismiss, dated May 23, 2019, in *Holcombe v. United States of America*, Case No. 5:18-CV-555-XR, the lawsuit pending in the United States District Court for the Western District of Texas in which plaintiffs in this case and other victims of Devin Kelley's sued the United States Air Force.

STATEMENT OF THE CASE

Nature of the Case: These four lawsuits, which were combined for pretrial proceedings, were brought by victims and families of victims of the criminal conduct of Devin Kelley in the Sutherland Springs First Baptist Church shooting on November 5, 2017. Sixteen (16) Plaintiffs assert various negligence-based claims against Academy for selling a rifle and a 30-round magazine to Kelley on April 7, 2016, a year and a half prior to his criminal actions.

Respondent: Honorable Karen Pozza
407TH JUDICIAL DISTRICT COURT
San Antonio, Texas

Respondent's Action: In a single-sentence order, the trial court denied (App. Tab I at 567) Academy's motion for summary judgment (App. Tab F at 91) asserting immunity under the federal Protection of Lawful Commerce in Arms Act. PLCAA bars claims in both federal and state courts against lawful sellers of firearms and other qualified products for damages and injunctive relief resulting from the criminal actions of a third party.

In single-sentence order, the trial court also denied (App. Tab L at 685) Academy's request, pursuant to Section 51.014(d) of the Texas Civil Practice and Remedies Code, for a permissive interlocutory appeal (App. Tab J at 616) of the controlling issues of law that were raised in the summary judgment proceedings.

Court of Appeals: Academy filed a petition for writ of mandamus in the Fourth Court of Appeals on April 9, 2019.

Court of Appeals' Action: By order and a five-sentence *per curiam* opinion dated May 22, 2019, the Court of Appeals denied Academy's petition for writ of mandamus. (App. Tab M). The order and *per curiam* opinion were joined by Justices Irene Rios and Beth Watkins. Chief Justice Sandee Bryan Marion "dissent[ed] to the denial without requesting a response."

TERMS AND DEFINITIONS

Academy	Academy, Ltd. d/b/a Academy Sports + Outdoors
Brady Act	Brady Handgun Violence Prevention Act – 34 U.S.C. § 40901 *et seq*, which created the NICS.
Commerce Clause	U.S. Constitution Article I, Section 8, Clause 3
Kelley	Devin Kelley, the Air Force veteran who committed the shootings at the First Baptist Church in Sutherland Springs, Texas in November 2017, and then killed himself.
NICS	National Instant Criminal Background Check System created by the Brady Act – 28 C.F.R. Part 25.
PLCAA	Protection of Lawful Commerce in Arms Act – 15 U.S.C. § 7901 *et seq*.
Supremacy Clause	U.S. Constitution Article VI, Clause 2
TCP&R Code	Texas Civil Practice & Remedies Code
TRAP	Texas Rules of Appellate Procedure
TRCP	Texas Rules of Civil Procedure

STATEMENT OF JURISDICTION

This Court has the power and jurisdiction to grant the writ of mandamus sought in this petition under Article V, Section 3 of the Texas Constitution, Section 22.002(a) of the Texas Government Code, and TRAP 52. The case presents extraordinary circumstances and questions of law that are important to the jurisprudence of the State—whether federal statutory immunity requires immediate dismissal of the litigation and whether mandamus relief is available to enforce the immunity required by the Supremacy Clause when the lower courts refused without explanation to do so. This case presents the Court with an opportunity to further refine the narrow scope of interlocutory orders that warrant mandamus review, as it fits well within the parameters of *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004) (orig. proceeding).

The considerations in TRAP 56.1(a) for granting mandamus review are present in this petition: justices on the court of appeals disagree, statutory construction is central to the dispute, federal constitutional issues and rights are at stake, the trial court committed errors of law that are very important to the jurisprudence of the State, and the issues are novel but likely to recur and should be resolved by the Supreme Court now.

ISSUES PRESENTED

1. Did the trial court fail to properly interpret and apply the federal Protection of Lawful Commerce in Arms Act (PLCAA) to bar Plaintiffs' claims against a licensed seller of firearms and other qualified products for damages resulting from the criminal actions of a third party?

    a. Do Plaintiffs' claims fail to satisfy any exception to PLCAA's bar on filing qualified civil liability actions?

    b. Does PLCAA immunity apply in cases where plaintiffs allege that their harm was at least partially caused by the seller of a firearm instead of only in cases where such harm has been "solely caused" by the criminal actions of a third party?

2. Does the trial court's denial of Academy's motion for summary judgment deprive Academy of an adequate remedy by appeal by forcing it to endure discovery, pre-trial motions, and a trial, thus forever depriving it of PLCAA's federal immunity from suit?

3. Alternatively, did the trial court abuse its discretion, leaving Academy with no adequate remedy by appeal, by denying Academy's motion for permissive interlocutory appeal?

INTRODUCTION

The United States Congress passed PLCAA to prohibit lawsuits that attempt to shift civil liability for the unlawful misuse of firearms from responsible criminals to law-abiding firearms retailers. No court has discretion to ignore an unequivocal grant of federal immunity from state law claims. The Supremacy Clause of the United States Constitution "imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected'," including enforcement in state courts of a federal statutory grant of immunity from suit. *See Felder v. Casey*, 487 U.S. 131, 151 (1988) (citation omitted). Academy's motion for summary judgment demonstrates Academy's federally protected right to immunity as a matter of law. The trial court's denials of Academy's motions for summary judgment and for a permissive interlocutory appeal constitute clear abuses of discretion.

If this Court does not enforce the immunity, Academy will irreparably lose its statutory protection from ongoing litigation, discovery, and potentially a trial, all of which are barred by PLCAA. The trial court's denials have already subjected Academy to the harm that Congress intended to prevent—extensive discovery and litigation in contravention of the federal PLCAA immunity.

Equally compelling, the necessity for mandamus review is substantially heightened by the extraordinary consequences that will result from a failure of state

courts to adhere to the Constitution and enforce federal statutory mandates. Failure to uphold the law will cause irreparable harm in several ways:

(i) Congress's authority under the United States Constitution to set uniform national policy over firearms sold in interstate commerce will be thwarted, as will the intent of PLCAA.

(ii) This State's judiciary will exercise authority over litigation against a party that is immune from suit with the resulting waste of time, resources, and expense to both the State and the litigants.

This case presents a compelling basis for the Court to grant mandamus review because there is no adequate remedy by appeal and the trial court clearly abused its discretion. If state courts decline to enforce PLCAA, the clear and broad federal immunity from even having to defend against barred claims will forever be lost to licensed dealers like Academy. The Court recognized this basis for mandamus relief in *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465 (Tex. 2008) (orig. proceeding), explaining:

> [t]he most frequent use we have made of mandamus relief involves cases in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved.

The substantive right at issue here is the right not to be sued at all. Texas trial courts have no discretion to allow lawsuits to proceed that Congress has commanded shall not even be brought.

PLCAA bars all of Plaintiffs' claims against Academy, federal law compels dismissal, and the trial court was required to grant Academy's motion for summary judgment. With only legal issues presented and the de novo standard of review for summary judgments, mandamus relief is not only proper, but necessary to ensure compliance with Congress's national mandate and halt the irreparable loss of immunity. Alternatively, the trial court should have granted a permissive interlocutory appeal to have these questions of law resolved immediately in the appellate courts.

STATEMENT OF FACTS

I. PLCAA – The Federal Statute That Provides Immunity For Academy.

After extended study, Congress promulgated PLCAA in 2005. (App. Tabs A–C). PLCAA provides immunity from suit for licensed firearm dealers for the criminal actions of third parties, unless one of the narrow statutory exceptions applies. Authorized by the U.S. Constitution's Commerce Clause and the preeminence of federal over state law under the Supremacy Clause, Congress barred the filing of any suit in "any Federal or State court" that transgresses PLCAA's intent. *See* 15 U.S.C. § 7902(a); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 393 (2d Cir. 2008).

These four lawsuits seek to hold Academy civilly liable on state common-law claims for selling a rifle and magazines to Kelley, but PLCAA immunizes Academy

from suit because the sale fully complied with state and federal law. Plaintiffs dispute whether that sale was lawful—a pure question of statutory interpretation unburdened by any questions of fact.

II. Devin Kelley, Who Criminally Attacked Worshippers In Sutherland Springs, Texas, Purchased A Firearm And Magazines From Academy A Year And A Half Earlier.

In April 2016, more than a year and a half before his attack on worshippers at the First Baptist Church in Sutherland Springs in November 2017, Kelley purchased three "qualified products" from an Academy store in Texas: a firearm (the Ruger AR-556 rifle) and two Magpul detachable 30-round magazines.[2] A magazine is a removable container that stores ammunition and uses spring pressure to deliver a round into the firearm's chamber as needed.[3] One of the two magazines was packaged by Ruger in a retail box along with the rifle.[4] The other magazine was packaged separately. While federal law requires serial numbers on firearms and tracks their sales, no similar requirements exist for magazines.[5]

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[2] MR at 170; 147. "Qualified product" is defined in PLCAA, 15 U.S.C. § 7903(4) (App. Tab C). Magazines are component parts of firearms and are therefore "qualified products" for purposes of PLCAA.

[3] *See* R.A. Steindler, STEINDLER'S NEW FIREARMS DICTIONARY 163–164 (Stackpole Books 1985).

[4] MR at 97. *See Ruger AR-556 Standard Autoloading Rifle Model 8500*, RUGER, https://ruger.com/products/ar556/specSheets/8500.html (last visited April 9, 2019).

[5] *See* 27 C.F.R. § 478.92. The serial number must be marked on the frame or receiver, which is the only part of a weapon included within the definition of "firearm." 27 C.F.R. §§ 478.11 & 478.92(a)(1)(i). Federal law does not require markings on magazines.

The Academy store that sold the firearm and magazines holds a federal firearms license.[6] Academy properly processed the background check based on the ATF Form 4473 that applied to the sale of the firearm, which Kelly completed at the time of the sale under penalty of perjury.[7] Kelley represented on the Form 4473 that he was a Colorado resident, presented a Colorado driver's license, and swore in writing that it was legal for Academy to sell the rifle to him.[8]

Academy performed the required background check through the federal government's criminal background check system—NICS, created by the Brady Act in 1993.[9] Kelley passed the background check, and the NICS system instructed Academy to "Proceed" with the sale.[10] The Air Force has admitted it failed to forward critical disqualifying information about Kelley for inclusion in the NICS database.[11]

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6 MR at 170; 189.

7 MR at 183.

8 MR at 170; 183.

9 MR at 170; 187.

10 MR at 170; 187. Many of these Plaintiffs also sued the U.S. Air Force for failing to report Kelley's history of violence (including death threats) and mental health concerns to the NICS database. *See Holcombe v. United States of America*, Case No. 5:18-CV-555-XR, pending in the United States District Court for the Western District of Texas, Order on Motion to Dismiss dated 5/23/2019 (App. Tab N at 4–5, 7). Judge Xavier Rodriguez recently allowed that action to proceed, noting: "It is true that the gun retailers relied on some government representation (the 'Proceed' signal from NICS) in selling Kelley the firearms." (App. Tab N at 16).

11 Report of Investigation into the United States Air Force's Failure to Submit Devin Kelley's Criminal History Information to the Federal Bureau of Investigation, *available at* https://media.defense.gov/2018/Dec/07/2002070069/-1/-1/1/DODIG-2019-030_REDACTED.PDF.

After Kelley's criminal attack, sixteen (16) Plaintiffs filed these lawsuits against Academy, seeking damages resulting from Kelley's criminal actions.[12] The trial court combined these lawsuits for pretrial matters.[13] In each suit, Plaintiffs assert four causes of action against Academy: 1) negligence, 2) negligent hiring, training, and supervision, 3) negligent entrustment, and 4) gross negligence.[14] Plaintiffs' petitions focus on the sale of the 30-round magazine that was contained in the same retail package as the rifle sold to Kelley.

III. The Lower Courts Declined To Enforce The Federal Mandate Of PLCAA Immunity

A. *The trial court denied Academy's Motion for Summary Judgment that sought to enforce PLCAA immunity.*

Academy moved for summary judgment because PLCAA bars all of Plaintiffs' claims and requires their immediate dismissal.[15] (App. Tab F). Based on the undisputed facts, Academy urged that Plaintiffs' claims were barred by the

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[12] MR at 1, 21, 33, and 39. Another 56 plaintiffs later filed a fifth lawsuit alleging substantially the same claims. *See* TEX. R. EVID. 201 (the Court may take judicial notice of facts); SBG San Antonio Staff Reports, *Sutherland Springs shooting victims file new lawsuit against Academy Sports*, NEWS4SA (Feb. 28, 2019), *available at* https://news4sanantonio.com/news/local/sutherland-springs-shooting-victims-file-new-lawsuit-against-academy-sports (last visited March 29, 2019).

[13] MR at 59.

[14] MR at 126–128, 138–139, 148–150, 159–160. Plaintiffs in two of the four lawsuits have amended to allege public nuisance and seek injunctive relief.

[15] MR at 91.

express language of PLCAA and none of them satisfy any of the narrow enumerated statutory exceptions to immunity under PLCAA.[16]

Plaintiffs argued in the trial court that their claims are within one or more statutory exceptions, and that PLCAA does not apply to their claims.[17] (App. Tab G). Plaintiffs asserted that: 1) the predicate exception (discussed below) allowed their negligence-based claims to proceed: 2) the exception for negligent entrustment allowed that claim to proceed: and 3) PLCAA only applies to claims when the harm is "solely caused" by the acts of a third party, but not when the alleged negligence of a firearm seller is alleged to be "a cause" of the harm.[18] All Plaintiffs' arguments raise pure questions of law. In an order dated February 4, 2019, the trial court denied Academy's motion for summary judgment without explanation.[19] (App. Tab I at 567).

B. *The trial court denied Academy's request for a permissive interlocutory appeal.*

Because Academy's immunity and the viability of Plaintiffs' claims depend on immediate resolution of controlling issues of law, Academy sought permission

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16 MR at 91 *et seq*.

17 MR at 194.

18 MR at 195 *et seq*.

19 MR at 567.

for an interlocutory appeal of the trial court's ruling.[20] (App. Tab J at 616). The trial court denied this request without explanation.[21] (App. Tab L at 685).

C. *The Court of Appeals denied Academy's Petition for Writ of Mandamus.*

Academy promptly filed a petition for writ of mandamus with the Fourth Court of Appeals, which denied the petition on May 22, 2019, also without explanation. (App. Tab M). Chief Justice Marion "dissent[ed] to the denial without requesting a response" from Plaintiffs.

SUMMARY OF THE ARGUMENT

Federal law requires dismissal of these four lawsuits. The trial court clearly abused its discretion by failing to do so and by denying Academy's request to pursue an interlocutory appeal. Academy has no adequate remedy by appeal if it is forced to litigate these actions when federal law provides it with immunity from having to do so.

The undisputed facts demonstrate that Academy's sale of qualified products to Kelley fully complied with all applicable federal and state statutes. The "predicate exception" in PLCAA, which requires the violation of an applicable statute, therefore does not save Plaintiffs' claims. The "negligent entrustment" exception fails because Texas common law does not recognize such a claim arising from a

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20 MR at 616.

21 MR at 685.

sale, as opposed to *lending*, of goods. Plaintiffs' other suggestions why PLCAA does not apply are equally unavailing.

The Supremacy Clause requires that state courts enforce PLCAA to dismiss Plaintiffs' state law claims. If Academy is forced to endure additional discovery[22] and pre-trial proceedings or wait until after trial and final judgment to seek appellate review, it will forever lose the protections that PLCAA provides. Thus, a post-trial appeal is an inadequate remedy if Academy is compelled to defend against these barred claims.

ARGUMENT

I. In PLCAA, Congress Barred Suits Against Licensed Sellers Of Firearms And Component Parts Of Firearms In Which Plaintiffs Seek Damages Resulting From The Criminal Actions Of Third Parties.

Congress enacted PLCAA in 2005, granting licensed firearm dealers immunity from suit by providing that certain defined civil actions **"may not be brought in any Federal or State court."** 15 U.S.C. § 7902(a) (emphasis added). (App. Tab B).

In PLCAA's express findings, Congress documented that it had carefully considered its authority under the Commerce Clause to regulate interstate commerce, the rights of gun violence victims, the increase in lawsuits against

[22] The discovery Academy has already endured is outlined in Academy's contemporaneous Motion for Emergency Temporary Relief.

licensed firearm sellers arising from mass shootings by third-parties, and the right to bear arms protected by the Second Amendment to the United States Constitution. *See* 15 U.S.C. §§ 7901(a)(3), (5), and (6). (App. Tab A).

To avoid the burden placed on "an entire industry" from lawsuits seeking to impose civil liability for the lawful manufacture and sale of firearms and ammunition, PLCAA bars "qualified civil liability action[s]." 15 U.S.C. §§ 7901(a)(6), 7902(a). (App. Tab B). A "**qualified civil liability action**" is defined as:

> a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party ….

15 U.S.C. § 7903(5)(A). (App. Tab C). Because Academy is a firearms dealer licensed under 18 U.S.C. § 921(a)(11), it is a "seller" for purposes of PLCAA.[23] 15 U.S.C. § 7903(6)(b). A "qualified product" is defined as "a firearm," "ammunition," or "a component part of a firearm or ammunition" that has been shipped in interstate or foreign commerce. 15 U.S.C. § 7903(4).

Congress permitted certain narrow actions against firearm retailers to proceed. The exceptions plaintiffs asserted below are:

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[23] MR at 170; MR at 189.

- an action brought against a seller for negligent entrustment or negligence per se; [24] 15 U.S.C. § 7903(5)(A)(ii)

- an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought. 15 U.S.C. § 7903(5)(A)(iii)

(App. Tab C). The exception in Section 7903(5)(A)(iii) is known as the "predicate exception" because it requires, among other things, a violation of a state or federal law applicable to the sale or marketing of a qualified product (the predicate law). *Beretta*, 524 F.3d at 390. When the sale of a qualified product complies with the law, as here, the predicate exception is not satisfied.

The trial court abused its discretion by failing to properly apply the law to undisputed facts. Proper interpretation of PLCAA, related federal statutes, and Texas law bar Plaintiffs' claims. Because a "trial court has no 'discretion' in determining what the law is or applying the law to the facts," a trial court abuses its discretion when it misapplies the law. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). This is true even when the law is unsettled. *Prudential*, 148 S.W.3d at 135.

[24] Plaintiffs have not pled a claim for negligence per se. Such a claim depends on a violation of law, and therefore would fail because Academy's sale of qualified products to Kelley did not violate applicable law. *See Reeder v. Daniel*, 61 S.W.3d 359, 361–362 (Tex. 2001) (negligence per se relies on a penal statute to define the standard of care).

A. *Plaintiffs' claims do not meet the predicate exception.*

The predicate exception requires a violation of a state or federal statute "applicable to the sale or marketing" of a qualified product. 15 U.S.C. § 7903(5)(A)(iii). Plaintiffs assert that Academy violated a federal statute, specifically, 18 U.S.C. § 922(b)(3), when it sold the qualified products to Kelley. When Kelley purchased the rifle (a firearm) and two 30-round magazines (which are not firearms) from Academy in Texas, he listed a Colorado address on the Form 4473 and presented a Colorado driver's license.[25] Section 922(b)(3) generally prohibits the sale of a "firearm" to out-of-state residents, but this prohibition:

> **shall not apply to the sale** or delivery **of any rifle** or shotgun to a resident of a State other than a State in which the licensee's place of business is located **if the transferee meets in person** with the transferor to accomplish the transfer, **and the sale**, delivery, and receipt **fully comply with the legal conditions of sale in both such States** (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States) . . .

18 U.S.C. § 922(b)(3)(A) (emphasis added). (App. Tab E).

Academy met in person with Kelley and it cannot be disputed that the sale of the rifle alone fully complied with the law of both Texas and Colorado. Instead, Plaintiffs base their claims on the Colorado statute that prohibits the sale, inside Colorado, of a "large-capacity magazine," defined as a magazine with a capacity of

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[25] MR at 183.

more than 15 rounds. COLO. REV. STAT. § 18-12-302.[26] Plaintiffs reason that because the sale of the 30-round magazine would have been unlawful had the sale occurred in Colorado, the sale of the magazine in Texas to a Colorado resident failed to fully comply with Colorado law, and thus violated Section 922(b)(3).

Plaintiffs' novel argument fails for two reasons. First, Section 922(b)(3) is "applicable" only to the sale of *firearms* (i.e., the *rifle* purchased by Kelley), not the sale of *magazines*. The statutory definition of firearm does not include magazines, or any other component parts of firearms except for the frame or receiver. *See* 18 U.S.C. § 921(a)(3) (App. Tab D). Second, even pretending that Section 922(b)(3) applied to the sale of magazines, COLO. REV. STAT. § 18-12-302 expressly permits sales of "large capacity magazines" to Colorado residents when the sales occur *outside* of Colorado. Since the sale of the *rifle* and the sale of the *magazines* fully complied with the laws of both Texas and Colorado, Academy did not violate Section 922(b)(3) or any other applicable law. The predicate exception therefore does not save Plaintiffs' claims.

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[26] The constitutionality of this statute is being challenged in the Colorado Supreme Court in Case No. 2018SC817, styled *Rocky Mountain Gun Owners v. Hickenlooper*. https://www.courts.state.co.us/Courts/Supreme_Court/Case_Announcements/Files/2019/73D76304.22.19.pdf (granting certiorari *en banc* to determine, among other things, "[w]hether HB 1224 [which includes § 18-12-302] violates the right to bear arms as set forth in … the Colorado Constitution").

B. *Plaintiffs' claims for negligent entrustment based on the sale of goods fail as a matter of law.*

Because PLCAA does not provide an independent cause of action (15 U.S.C. § 7903(5)(C)), the viability of Plaintiffs' negligent entrustment claim depends on whether Texas law recognizes such a cause of action based on the *sale*, as opposed to the *lending*, of goods. It does not. The **sale** of goods cannot support a negligent entrustment claim in Texas. *Nat'l Convenience Stores, Inc. v. T.T. Barge Cleaning Co.*, 883 S.W.2d 684, 686 (Tex. App.—Dallas 1994, writ denied); *Salinas v. Gen. Motors Corp.*, 857 S.W.2d 944, 948 (Tex. App.—Houston [1st Dist.] 1993, no writ). *See also Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170, 179 (5th Cir. 2018) (noting that "Texas has not adopted Restatement (Second) of Torts § 390 with respect to the sale of a chattel").

C. *PLCAA is not limited to claims where harm is alleged to be "solely caused" by the actions of a third party.*

Relying on certain phrases in the "findings" and "purposes" section of PLCAA (and ignoring others), Plaintiffs argued below that PLCAA's statutory bar applies *only* in cases where the harm is alleged to have been "solely caused" by the criminal actions of a third party, but not where the harm is alleged to be at least partially caused by a firearm seller. *See* 15 U.S.C. §§ 7901(a)(6), (b)(1) (App. Tab A). This argument is defeated by properly interpreting PLCAA.

In the operative provisions of PLCAA, a "qualified civil liability action" is defined as any action "*resulting* from the criminal or unlawful misuse" of a firearm by a third party, with certain enumerated exceptions. 15 U.S.C. § 7903(5)(A) (emphasis added). The "findings" and "purposes" provisions of PLCAA cannot override the express operative language of the statute itself. *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 192 (Tex. 2012); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 322 (Mo. 2016) ("the statement of purpose does not overcome the fact that the specific substantive provisions of PLCAA expressly preempt all qualified civil liability actions against firearms sellers, including claims of negligence").

II. <u>This Case Presents Extraordinary Circumstances That Warrant Mandamus Relief And Academy Has No Adequate Remedy At Law.</u>

This case presents extraordinary circumstances that justify immediate appellate review of the denial of a motion for summary judgment to avoid the "irreversible waste of judicial and public resources that would be required here if mandamus does not issue." *Prudential*, 148 S.W.3d at 137. As in *Prudential*, this case

> fits well within the types of issues for which mandamus review is not only appropriate but necessary. It is an issue of law, one of first impression for us, but likely to recur …. It eludes answer by appeal. In no real sense can the trial court's denial of [Academy's] [statutory] right to [not have to even defend these suits] ever be rectified on appeal. If [Academy] were to obtain judgment on a favorable jury verdict, it could not appeal, and its [statutory] right would be lost forever.

See Id. at 138; *see also McAllen*, 275 S.W.3d at 465, 469.

This is an exceptional case involving significant lower court rulings that contradict express federal statutes and caselaw and present issues of first impression that are likely to recur. No court in the country has addressed Plaintiffs' unsupported predicate exception argument. No Texas appellate court has addressed PLCAA, much less its application to claims asserted under Texas common law.[27] Without enforcement of PLCAA's protection, legislative intent will be thwarted and Academy's right to immunity from suit will be "lost forever."

This case presents truly extraordinary circumstances since Texas courts must protect the substantial rights of parties under controlling federal law. *See Felder*, 487 U.S. at 151. PLCAA unambiguously provides licensed firearm dealers immunity from suit resulting from the criminal actions of third parties, and its purposes would be defeated if these suits are allowed to proceed. *See Beretta*, 524 F.3d 384 at 398 (discussing PLCAA's immunity); *In re United Servs. Auto. Ass'n (USAA)*, 307 S.W.3d 299, 314 (Tex. 2010) (mandamus relief appropriate when, in part, denying such relief "would thwart the legislative intent") (orig. proceeding); *see also McAllen*, 275 S.W.3d at 462 (same).

Academy has no adequate remedy by appeal because its right not to be sued will be forever lost. *Prudential*, 148 S.W.3d at 135–36; *McAllen*, 275 S.W.3d at 469.

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[27] The only Texas case mentioning PLCAA is *Eagle Gun Range, Inc. v. Bancalari*, 495 S.W.3d 887 (Tex. App.—Fort Worth 2016, no pet.), but in that case, the court dismissed a permissive interlocutory appeal for lack of jurisdiction and the court did not address PLCAA.

An appeal is inadequate if mandamus relief is the only available avenue to enforce a statute's intent to prevent certain claims from being brought. *See USAA*, 307 S.W.3d at 314. An appeal is inadequate when proceeding to trial would defeat a substantive right. *McAllen*, 275 S.W.3d at 465.

The substantive right Academy seeks to enforce is its statutory right of immunity from suit, placing this case well within the confines of *Prudential*. In *Prudential*, this Court held that mandamus was appropriate to enforce a contractual jury waiver, 148 S.W.3d at 138, but the relator still faced a bench trial. The lost right in the present case—the right not to be sued *at all*—is even more significant.

Academy's immunity from suit under PLCAA should shield it from even having to defend against these suits, a right that will be forever lost unless these proceedings are dismissed. Costs of defense may establish a right to mandamus relief where the legislative branch of government has balanced those costs, as Congress did here. *See McAllen,* 275 S.W.3d at 466. Unnecessary, duplicative proceedings that will waste private and judicial resources also justify mandamus relief. *See USAA*, 307 S.W.3d at 314; *CSR Ltd. v. Link*, 925 S.W.2d 591, 596–97 (Tex. 1996) (orig. proceeding). If Academy is forced to endure a potential trial and then pursue an appeal, the core purpose of PLCAA will be defeated and both public and private resources will have been wasted.

III. Alternatively, This Court Should Order The Trial Court To Permit An Interlocutory Appeal.

Mandamus review is the most effective tool for this Court to address the merits of these critical issues immediately. Alternatively, Academy seeks a writ of mandamus ordering the trial court to permit an interlocutory appeal of the controlling questions of law[28] under TCP&R CODE Section 51.014(d) and TRCP 168.[29] The trial court's denial of permission to appeal was an abuse of discretion because this case falls squarely within the requirements of Section 51.014(d) and is precisely the type of extraordinary case for which this process was designed.

Section 51.014 was enacted to provide an expedited avenue to resolve important legal issues and reduce "the overall costs of the civil justice system to all taxpayers." *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 732 (Tex. 2019) (citation omitted). Section 51.014(d)'s permissive interlocutory appeal review is to be used where an appellate decision on a difficult, unclear matter of law will increase the court system's efficiency and reduce litigation costs for the parties and the taxpayers by promoting early resolution of cases when further fact development is unnecessary. *See* TCP&R CODE §§ 51.014(d)(1)–(2). Each of these factors is present here.

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[28] The questions of law presented to the trial court, which are the same substantive issues presented here, can be found at MR 620–621.

[29] MR 616; MR 686–687.

In *Sabre*, while the Court held there was no abuse of discretion in the court of appeals' denial of the permissive appeal in that particular case, it cautioned that in some cases, courts of appeals *should* accept permissive appeals. *Sabre*, 567 S.W.3d at 732–33. This case involves novel and extraordinary circumstances within the statute's purpose. The trial court's denial of permission to appeal defeats the Legislature's purpose and can only be characterized as arbitrary and unreasonable.

An appeal after final judgment will not provide an adequate remedy for the same reasons discussed above. Without mandamus relief or a permissive interlocutory appeal, Academy will forever lose PLCAA's protection from having to defend against these lawsuits.

CONCLUSION AND PRAYER

Relator requests that this Court request full briefs on the merits, grant its petition for writ of mandamus, and grant such further relief, at law or in equity, to which it justly may be entitled.

Respectfully submitted,

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RULE 52.3(J) CERTIFICATION

In compliance with Rule 52.3(j) of the Texas Rules of Appellate Procedure, I certify that I have reviewed the petition for writ of mandamus and have concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

/s/ Elizabeth G. Bloch
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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitations of TEX. R. APP. P. 9.4(i)(2)(D) because this brief consists of 4,495 words as determined by Microsoft Word Count, excluding the parts of the petition exempted by TEX. R. APP. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served on counsel of record by using the Court's CM/ECF system on the 11th day of June 2019, addressed as follows:

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APPENDIX

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Tab B	15 U.S.C. § 7902
Tab C	15 U.S.C. § 7903
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Tab J	Defendant Academy, LTD. d/b/a Academy Sports + Outdoors's Motion to Permit Interlocutory Appeal of the Court's Summary Judgment Order and Motion to Amend the Summary Judgment Order (3/11/2019)
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Tab L	[Signed] Order on Motion to Permit Interlocutory Appeal [Denying Defendant Academy, LTD. d/b/a Academy Sports + Outdoors's Motion to Permit Interlocutory Appeal of the Court's Summary Judgment Order and Motion to Amend the Summary Judgment Order] (3/20/2019)

Tab M	Fourth Court of Appeals' Order and Per Curiam Opinion denying Academy's Petition for Writ of Mandamus (5/22/2019)
Tab N	Order on Motion to Dismiss in *Holcombe v. United States of America*, Case No. 5:18-CV-555-XR, pending in the United States District Court for the Western District (5/23/2019)

TAB A

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 15. Commerce and Trade
Chapter 105. Protection of Lawful Commerce in Arms

15 U.S.C.A. § 7901

§ 7901. Findings; purposes

Effective: October 26, 2005
Currentness

(a) Findings

Congress finds the following:

(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

(3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

(b) Purposes

The purposes of this chapter are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

(7) To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

CREDIT(S)

(Pub.L. 109-92, § 2, Oct. 26, 2005, 119 Stat. 2095.)

Notes of Decisions (8)

15 U.S.C.A. § 7901, 15 USCA § 7901
Current through P.L. 116-5.

End of Document

TAB B

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 15. Commerce and Trade
Chapter 105. Protection of Lawful Commerce in Arms

15 U.S.C.A. § 7902

§ 7902. Prohibition on bringing of qualified civil liability actions in Federal or State court

Effective: October 26, 2005
Currentness

(a) In general

A qualified civil liability action may not be brought in any Federal or State court.

(b) Dismissal of pending actions

A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.

CREDIT(S)

(Pub.L. 109-92, § 3, Oct. 26, 2005, 119 Stat. 2096.)

Notes of Decisions (9)

15 U.S.C.A. § 7902, 15 USCA § 7902
Current through P.L. 116-5.

End of Document

TAB C

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 15. Commerce and Trade
Chapter 105. Protection of Lawful Commerce in Arms

15 U.S.C.A. § 7903

§ 7903. Definitions

Effective: October 26, 2005
Currentness

In this chapter:

(1) Engaged in the business

The term "engaged in the business" has the meaning given that term in section 921(a)(21) of Title 18, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) Manufacturer

The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of Title 18.

(3) Person

The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) Qualified product

The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of Title 18), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) Qualified civil liability action

(A) In general

The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include--

(i) an action brought against a transferor convicted under section 924(h) of Title 18, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including--

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18;

(iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26.

(B) Negligent entrustment

As used in subparagraph (A)(ii), the term " negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) Rule of construction

The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this chapter shall be construed to create a public or private cause of action or remedy.

(D) Minor child exception

Nothing in this chapter shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) Seller

The term "seller" means, with respect to a qualified product--

(A) an importer (as defined in section 921(a)(9) of Title 18) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of Title 18;

(B) a dealer (as defined in section 921(a)(11) of Title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of Title 18; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of Title 18) in interstate or foreign commerce at the wholesale or retail level.

(7) State

The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) Trade association

The term "trade association" means--

(A) any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of Title 26 and exempt from tax under section 501(a) of such title; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) Unlawful misuse

The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

CREDIT(S)

(Pub.L. 109-92, § 4, Oct. 26, 2005, 119 Stat. 2097.)

Notes of Decisions (12)

15 U.S.C.A. § 7903, 15 USCA § 7903
Current through P.L. 116-5.

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TAB D

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 44. Firearms (Refs & Annos)

18 U.S.C.A. § 921

§ 921. Definitions

Effective: February 1, 2019
Currentness

(a) As used in this chapter--

(1) The term "person" and the term "whoever" include any individual, corporation, company, association, firm, partnership, society, or joint stock company.

(2) The term "interstate or foreign commerce" includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

(3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

(4) The term "destructive device" means--

(A) any explosive, incendiary, or poison gas--

(i) bomb,

(ii) grenade,

(iii) rocket having a propellant charge of more than four ounces,

(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,

(v) mine, or

(vi) device similar to any of the devices described in the preceding clauses;

(B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and

(C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 7684(2), 7685, or 7686 of title 10; or any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

(5) The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(6) The term "short-barreled shotgun" means a shotgun having one or more barrels less than eighteen inches in length and any weapon made from a shotgun (whether by alteration, modification or otherwise) if such a weapon as modified has an overall length of less than twenty-six inches.

(7) The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger.

(8) The term "short-barreled rifle" means a rifle having one or more barrels less than sixteen inches in length and any weapon made from a rifle (whether by alteration, modification, or otherwise) if such weapon, as modified, has an overall length of less than twenty-six inches.

(9) The term "importer" means any person engaged in the business of importing or bringing firearms or ammunition into the United States for purposes of sale or distribution; and the term "licensed importer" means any such person licensed under the provisions of this chapter.

(10) The term "manufacturer" means any person engaged in the business of manufacturing firearms or ammunition for purposes of sale or distribution; and the term "licensed manufacturer" means any such person licensed under the provisions of this chapter.

(11) The term "dealer" means (A) any person engaged in the business of selling firearms at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

(12) The term "pawnbroker" means any person whose business or occupation includes the taking or receiving, by way of pledge or pawn, of any firearm as security for the payment or repayment of money.

(13) The term "collector" means any person who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define, and the term "licensed collector" means any such person licensed under the provisions of this chapter.

(14) The term "indictment" includes an indictment or information in any court under which a crime punishable by imprisonment for a term exceeding one year may be prosecuted.

(15) The term "fugitive from justice" means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.

(16) The term "antique firearm" means--

(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or

(B) any replica of any firearm described in subparagraph (A) if such replica--

(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or

(C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term "antique firearm" shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

(17)(A) The term "ammunition" means ammunition or cartridge cases, primers, bullets, or propellent powder designed for use in any firearm.

(B) The term "armor piercing ammunition" means--

(i) a projectile or projectile core which may be used in a handgun and which is constructed entirely (excluding the presence of traces of other substances) from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium; or

(ii) a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile.

(C) The term "armor piercing ammunition" does not include shotgun shot required by Federal or State environmental or game regulations for hunting purposes, a frangible projectile designed for target shooting, a projectile which the Attorney General finds is primarily intended to be used for sporting purposes, or any other projectile or projectile core which the Attorney General finds is intended to be used for industrial purposes, including a charge used in an oil and gas well perforating device.

(18) The term "Attorney General" means the Attorney General of the United States [1]

(19) The term "published ordinance" means a published law of any political subdivision of a State which the Attorney General determines to be relevant to the enforcement of this chapter and which is contained on a list compiled by the Attorney General, which list shall be published in the Federal Register, revised annually, and furnished to each licensee under this chapter.

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include--

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

(21) The term "engaged in the business" means--

(A) as applied to a manufacturer of firearms, a person who devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured;

(B) as applied to a manufacturer of ammunition, a person who devotes time, attention, and labor to manufacturing ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the ammunition manufactured;

(C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms;

(D) as applied to a dealer in firearms, as defined in section 921(a)(11)(B), a person who devotes time, attention, and labor to engaging in such activity as a regular course of trade or business with the principal objective of livelihood and profit, but such term shall not include a person who makes occasional repairs of firearms, or who occasionally fits special barrels, stocks, or trigger mechanisms to firearms;

(E) as applied to an importer of firearms, a person who devotes time, attention, and labor to importing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms imported; and

(F) as applied to an importer of ammunition, a person who devotes time, attention, and labor to importing ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the ammunition imported.

(22) The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection: *Provided,* That proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. For purposes of this paragraph, the term "terrorism" means activity, directed against United States persons, which--

(A) is committed by an individual who is not a national or permanent resident alien of the United States;

(B) involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and

(C) is intended--

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping.

(23) The term "machinegun" has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b)).

(24) The terms "firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.

(25) The term "school zone" means--

(A) in, or on the grounds of, a public, parochial or private school; or

(B) within a distance of 1,000 feet from the grounds of a public, parochial or private school.

(26) The term "school" means a school which provides elementary or secondary education, as determined under State law.

(27) The term "motor vehicle" has the meaning given such term in section 13102 of title 49, United States Code.

(28) The term "semiautomatic rifle" means any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge.

(29) The term "handgun" means--

(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and

(B) any combination of parts from which a firearm described in subparagraph (A) can be assembled.

[(30), (31) Repealed. Pub.L. 103-322, Title XI, § 110105(2), Sept. 13, 1994, 108 Stat. 2000.]

(32) The term "intimate partner" means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.

(33)(A) Except as provided in subparagraph (C), [2] the term "misdemeanor crime of domestic violence" means an offense that--

(i) is a misdemeanor under Federal, State, or Tribal [3] law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless--

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

(34) The term "secure gun storage or safety device" means--

(A) a device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device;

(B) a device incorporated into the design of the firearm that is designed to prevent the operation of the firearm by anyone not having access to the device; or

(C) a safe, gun safe, gun case, lock box, or other device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.

(35) The term "body armor" means any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment.

(b) For the purposes of this chapter, a member of the Armed Forces on active duty is a resident of the State in which his permanent duty station is located.

CREDIT(S)

(Added Pub.L. 90-351, Title IV, § 902, June 19, 1968, 82 Stat. 226; amended Pub.L. 90-618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1214; Pub.L. 93-639, § 102, Jan. 4, 1975, 88 Stat. 2217; Pub.L. 99-308, § 101, May 19, 1986, 100 Stat. 449; Pub.L. 99-360, § 1(b), July 8, 1986, 100 Stat. 766; Pub.L. 99-408, § 1, Aug. 28, 1986, 100 Stat. 920; Pub.L. 101-647, Title XVII, § 1702(b)(2), Title XXII, § 2204(a), Nov. 29, 1990, 104 Stat. 4845, 4857; Pub.L. 103-159, Title I, § 102(a)(2), Nov. 30, 1993, 107 Stat. 1539; Pub.L. 103-322, Title XI, §§ 110102(b), 110103(b), 110105(2), 110401(a), 110519, Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 1997, 1999, 2000, 2014, 2020, 2150; Pub.L. 104-88, Title III, § 303(1), Dec. 29, 1995, 109 Stat. 943; Pub.L. 104-208, Div. A, Title I, § 101(f) [Title VI, § 658(a)], Sept. 30, 1996, 110 Stat. 3009-371; Pub.L. 105-277, Div. A, § 101(b) [Title I, § 119(a)], (h) [Title I, § 115], Oct. 21, 1998, 112 Stat. 2681-69, 2681-490; Pub.L. 107-273, Div. C, Title I, § 11009(e)(1), Nov. 2, 2002, 116 Stat. 1821; Pub.L. 107-296, Title XI, § 1112(f)(1) to (3), (6), Nov. 25, 2002, 116 Stat. 2276; Pub.L. 109-162, Title IX, § 908(a), Jan. 5, 2006, 119 Stat. 3083; ; Pub.L. 115-232, Div. A, Title VII, § 809(e)(2), Aug. 13, 2018, 132 Stat. 1842.)

Footnotes

1 So in original. Probably should be followed by a period.

2 So in original. No subparagraph (C) was enacted in subsec. (a)(33).

3 So in original. Probably should not be capitalized.

18 U.S.C.A. § 921, 18 USCA § 921

Current through P.L. 116-5.

End of Document

TAB E

KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedUnconstitutional as Applied by Miller v. Sessions, E.D.Pa., Feb. 04, 2019

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 44. Firearms (Refs & Annos)

18 U.S.C.A. § 922

§ 922. Unlawful acts

Currentness

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver--

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) ...

TAB F

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF F.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR;	§	**IN THE DISTRICT COURT**
***Plaintiffs*,**	§	
v.	§	**BEXAR COUNTY, TEXAS**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	**224TH JUDICIAL DISTRICT**
***Defendant*.**	§	

COMBINED FOR PRETRIAL MATTERS WITH
CAUSE NO. 2018CI14368

ROSANNE SOLIS AND JOAQUIN RAMIREZ,	§	**IN THE DISTRICT COURT**
***Plaintiffs*,**	§	
v.	§	**BEXAR COUNTY, TEXAS**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	**438TH JUDICIAL DISTRICT**
***Defendant*.**	§	

CAUSE NO. 2018CI23302

ROBERT BRADEN,	§	**IN THE DISTRICT COURT**
***Plaintiff*,**	§	
v.	§	**BEXAR COUNTY, TEXAS**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	**408TH JUDICIAL DISTRICT**
***Defendant*.**	§	

CAUSE NO. 2018CI23299

CHANCIE MCMAHAN, INDIVIDUALLY AND AS NEXT FRIEND OF R.W., A MINOR; ROY WHITE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LULA WHITE; AND SCOTT HOLCOMBE;	§	**IN THE DISTRICT COURT**
***Plaintiffs*,**	§	
	§	
v.	§	
	§	**285TH JUDICIAL DISTRICT**
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
***Defendant*.**	§	

DEFENDANT ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS'S SECOND AMENDED MOTION FOR TRADITIONAL SUMMARY JUDGMENT

Devin Kelley used a Ruger AR-556 rifle in an attack on the First Baptist Church in Sutherland Springs, Texas, in which he killed twenty-six people and injured more than twenty others. Kelley fled, and ultimately killed himself while being pursued. The Plaintiffs are some of Kelley's victims and their families, and they deserve compassion.

But they are not entitled to maintain a lawsuit against Academy, Ltd. d/b/a Academy Sports + Outdoors ("Academy")—the retailer that lawfully sold a rifle to Kelley in Texas more than a year and a half before the shooting. The Protection of Lawful Commerce In Arms Act (the "PLCAA"), 15 U.S.C. §§ 7901, *et seq.*, expressly forbids plaintiffs from even *filing* lawsuits like this one, which attempt to hold law-abiding firearm sellers liable for the purchaser's later criminal or unlawful misuse of the firearm. The PLCAA compels this Court to dismiss the Plaintiffs' lawsuit.

The PLCAA has a few narrow exceptions, but none apply here:

- The PLCAA excepts negligent entrustment claims if authorized by state law, but Texas refuses to allow negligent entrustment claims based on selling instead of lending.
- The PLCAA excepts certain claims alleging statutory violations: negligence per se claims, or claims under the so-called "predicate exception"—that in selling the rifle to Kelley, Academy knowingly violated a specific statute applicable to the sale or marketing of "qualified products." But Academy violated no statute. Academy complied with federal and state law, and Kelley passed his federal background check.

In an effort to convince this Court that an exception to the PLCAA applies, Plaintiffs will string together an untenable argument about the incidental sale of a *magazine*—a detachable container that holds ammunition. 18 U.S.C. § 922(b)(3) mandates that when selling a "firearm" to an out-of-state resident, Academy must "fully comply with the legal conditions of sale" in both the seller's state (Texas) and the buyer's state of residence indicated on the Form 4473 (Colorado). The AR-556 rifle itself can be legally sold in both Texas and Colorado. Nevertheless, despite the wholly lawful sale of the AR-556 rifle, Plaintiffs will protest that Ruger included a 30-round magazine in the AR-556 rifle's packaging, and assert that this fact supposedly negates Academy's PLCAA protections because Colorado does not allow the sale *in Colorado* of magazines with a capacity greater than 15 rounds.

This argument does not state a violation of any statute, or an exception to the PLCAA, for two reasons:

(1) Colorado and Texas state law permit Academy to sell 30-round magazines to Colorado residents in Texas; and

(2) The federal statute cited by the Plaintiffs only restricts the sale of "firearms," and magazines are not included in the definition of "firearms" for purposes of that law, 18 U.S.C. 922(b)(3) (though they are "qualified products" protected by the PLCAA).

Because Plaintiffs cannot show that Academy violated Section 922(b)(3) or any other statute, the predicate exception does not apply, and the PLCAA compels this Court to immediately dismiss this lawsuit.

The clear statutory distinction between "firearms" and magazines prevents Plaintiffs from blurring the differences between the rifle and the magazine. Plaintiffs may argue that Academy should have sold Kelley a different "model number" of the AR-556 rifle—but that only means selling Kelley the very same rifle with a 10-round magazine instead of a 30-round magazine in the box. Or Plaintiffs may try to claim that the magazine is a "part" of the AR-556 rifle, but that does not change the law either. Either way, the rifle and the magazine can both be legally sold in Texas to a Colorado resident.

These issues of pure law present no factual disputes, and should be promptly decided by this Court on summary judgment to give effect to Congress's ban on lawsuits like this one. Accordingly, pursuant to TEX. R. CIV. P. 166a, Defendant Academy moves for a traditional summary judgment dismissing all claims asserted by the Plaintiffs in these four cases,[1] two of which have been consolidated for pretrial and summary judgment.

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[1] The Plaintiffs in cause number 2017CI23341 are Chris Ward, individually and as representative of the Estates of Joann Ward, Deceased and B.W., Deceased Minor, and as Next Friend Of R.W., A Minor; and Plaintiffs Robert Lookingbill and Dalia Lookingbill, individually and as Next Friend Of R.G., A Minor, and as Representatives of The Estate Of E.G., Deceased Minor. The Plaintiffs in cause number 2018CI14368 are Rosanne Solis and Joaquin Ramirez, which has been consolidated for pretrial purposes with the Ward/Lookingbill case. The Plaintiff in cause number 2018CI23302 is Robert Braden. The Plaintiffs in cause number 2018CI23299 are Chancie McMahan, individually and as Next Friend of R.W., A Minor; Roy White, individually and as representative of the Estate of Lula White; and Scott Holcombe. The Braden and McMahan/White/Holcombe plaintiffs previously attempted to

I. SUMMARY JUDGMENT EVIDENCE

Academy's motion for summary judgment is supported by the following evidence:

- Exhibit 01 – Ward/Lookingbill Plaintiffs' Second Amended Petition;
- Exhibit 02 – Solis/Ramirez Plaintiffs' Petition;
- Exhibit 03 – Braden Plaintiff's Petition;
- Exhibit 04 – McMahan/White/Holcombe Plaintiffs' Petition;
- Exhibit 05 – Business Records Affidavit (unredacted copy to be filed under seal);
- Exhibit 06 – Form 4473 for the Sale of a Ruger AR-556 Rifle to Devin Kelley (unredacted copy to be filed under seal);
- Exhibit 07 – Proceed Notification from NICS Background Check for Sale of the AR-556 Rifle to Devin Kelley;
- Exhibit 08 – Federal Firearms License for Academy Store 41; and
- Exhibit 09 – Transaction Display for the Sale of the AR-556 Rifle.

II. UNDISPUTED FACTS SUPPORTING THE DISMISSAL OF ALL CLAIMS AGAINST ACADEMY

The facts are straightforward and undisputed. Plaintiffs allege that on November 5, 2017, Devin Kelley used a Ruger AR-556 rifle in a criminal attack on the First Baptist Church in Sutherland Springs, Texas, in which he killed twenty-six people and injured more than twenty others.[2] The Plaintiffs are some of the victims of Kelley's crime and their representatives.[3]

Kelley purchased the Ruger AR-556 rifle from an Academy store in San Antonio, Texas in April 2016, more than a year and a half before the shooting.[4] The Academy store in question

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intervene in the Ward/Lookingbill and Solis/Ramirez cases, but recently nonsuited their interventions and filed separate lawsuits.

[2] Exhibit 01, Ward/Lookingbill Petition, at ¶ 14; Exhibit 02, Solis/Ramirez Petition, at p.2; Exhibit 03, Braden Petition, at ¶ 6; Exhibit 04, McMahan/White/Holcombe Petition, at ¶ 8.

[3] Exhibit 01, Ward/Lookingbill Petition, at ¶ 14; Exhibit 02, Solis/Ramirez Petition, at p.2; Exhibit 03, Braden Petition, at ¶ 7; Exhibit 04, McMahan/White/Holcombe Petition, at ¶ 9-11.

[4] Exhibit 05, Business Records Affidavit, at ¶ 4.

holds a federal firearms license, and lawfully sold Kelley this firearm.[5] The evidence conclusively shows that Academy properly processed ATF Form 4473, the form that the federal government requires firearm purchasers to complete under penalty of perjury.[6] Kelley's responses indicated that it was legal for Academy to sell the rifle to Kelley, and for Kelley to purchase and possess it.[7]

Academy then performed a background check through the federal government's National Instant Criminal Background Check System ("NICS").[8] Kelley passed the background check, and the NICS system instructed Academy to "Proceed" with the sale.[9] These facts are all undisputed—the Plaintiffs do not allege otherwise.[10]

After the shooting, facts came to light that were unknown to Academy at the time of the sale, and that contradict Kelley's affirmative representation on ATF Form 4473. According to the Department of Defense Office of the Inspector General, Kelley pleaded guilty to domestic violence charges during a 2012 court-martial that would have disqualified him from purchasing a firearm, and the Air Force admitted it did not forward this information to civilian law enforcement for inclusion in the NICS database.[11] The Plaintiffs and other victims of Kelley's assault have asserted claims against the federal government for failing to report Kelley's conviction to NICS, because proper reporting would have prevented Kelley from purchasing the

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[5] *Id.*, at ¶ 8; Exhibit 08, Federal Firearms License.

[6] Exhibit 06, Form 4473 for the Sale of the Ruger AR-556 Rifle to Devin Kelley.

[7] *Id.*; Exhibit 05, Business Records Affidavit, at ¶ 5.

[8] Exhibit 05, Business Records Affidavit, at ¶ 6; Exhibit 07, Proceed Notification from NICS Background Check for the Sale of the AR-556 Rifle to Devin Kelley.

[9] Exhibit 05, Business Records Affidavit, at ¶ 6; Exhibit 07, Proceed Notification from NICS Background Check for the Sale of the AR-556 Rifle to Devin Kelley.

[10] *See generally* Exhibit 01, Exhibit 02, Exhibit 03, Exhibit 04.

[11] Report of Investigation into the United States Air Force's Failure To Submit Devin Kelley's Criminal History Information to the Federal Bureau of Investigation, *available at* https://media.defense.gov/2018/Dec/07/2002070069/-1/-1/1/DODIG-2019-030_REDACTED.PDF.

rifle he used in his attack on First Baptist Church.[12] At any rate, Plaintiffs do not and cannot dispute the fact that NICS told Academy to "Proceed" with the firearm sale to Kelley.[13]

When Kelley purchased the Ruger AR-556 rifle from Academy, he presented a Colorado drivers' license and his Form 4473 indicated he was a Colorado resident.[14] The Plaintiffs have indicated they will claim Kelley's stated Colorado residency makes Academy liable for Kelley's actions, because they will baselessly assert that Academy's Texas store had to comply with Colorado laws restricting the capacity of magazines sold to purchasers in Colorado.[15] They make this argument to try to bring their claims within the PLCAA's predicate exception for a "knowing violation of a State or Federal statute applicable to the sale or marketing of the product." 15 U.S.C. § 7903(5)(A)(iii); *see infra Argument* (explaining the scope of the PLCAA).

Plaintiffs' misbegotten statutory argument turns on certain undisputed facts about the product that Kelley purchased. Ruger's standard packaging for the AR-556 rifle sold to Kelley includes a plastic 30-round detachable magazine manufactured by Magpul.[16] A detachable "magazine" is a removable container that stores ammunition and uses spring pressure to deliver a round into the firearm's chamber as needed.[17] Colorado law prohibits the sale in Colorado of magazines with a capacity greater than 15 rounds, but expressly permits the sale of such magazines outside of Colorado. *See infra*.

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[12] *See, e.g.*, Christina Eckert, *Family files claims against US Air Force 1 month after Sutherland Springs shooting*, WOAI/KABB, Dec. 5, 2017, https://news4sanantonio.com/news/local/family-files-claims-against-us-air-force-one-month-after-sutherland-springs-shooting; Steffi Lee, *Family of couple killed in Texas church shooting files claim against Air Force, DOD*, KXAN.com, Mar. 6, 2018, https://www.kxan.com/news/local-news/family-of-couple-killed-in-texas-church-shooting-files-claim-against-air-force-dod/1014206208.

[13] Exhibit 05, Business Records Affidavit, at ¶ 6; Exhibit 07, Proceed Notification from NICS Background Check for the Sale of the AR-556 Rifle to Devin Kelley.

[14] Exhibit 06, Form 4473 for the Sale of the Ruger AR-556 Rifle to Devin Kelley.

[15] *See* Exhibit 01, Exhibit 02, Exhibit 03, Exhibit 04.

[16] *See* https://ruger.com/products/ar556/specSheets/8500.html. Kelley purchased a second 30-round magazine at the time he purchased the AR-556. Exhibit 03, Braden Petition, at ¶ 12.

[17] *See* R.A. Steindler, STEINDLER'S NEW FIREARMS DICTIONARY 163-64 (Stackpole Books 1985).

As shown below, there is no Texas or federal prohibition on the sale of magazines in Texas, and this Colorado law prohibiting the sale of certain magazines in Colorado does not apply to out-of-state retailers who sell magazines outside of the state of Colorado. *Id.* And it is undisputed that Kelley committed his crimes in Texas, which imposes no restriction on the capacity of magazines.[18] Accordingly, Plaintiffs can allege no statutory violation that prevents the immediate dismissal of this case under the PLCAA. *See Argument infra.*

Plaintiffs have indicated they will argue that Ruger markets the AR-556 rifle under different "model numbers" reflecting certain items that are or are not included in the AR-556's packaging, including the capacity of the included magazine.[19] They will contend that if the sale had occurred in Colorado, Academy could not have sold Kelley the very same Ruger "Model 8500" AR-556 rifle, because that firearm's packaging includes a 30-round magazine.[20] Instead, they argue that Kelley could only have been sold a "Model 8511," which is the exact same AR-556 rifle, but its packaging contains a 10-round magazine. This is legally irrelevant because the "Model 8500," "Model 8511," and all "models" of the AR-556 contain the very same AR-556 rifle that is legal for sale in Texas and Colorado, and all "models" are lawful to sell in Texas to a Colorado resident.[21] In fact, these "model numbers" are not stamped or included anywhere on the AR-556 rifle itself; each rifle is stamped: "AR-556."

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[18] *See generally* Exhibit 01, Exhibit 02, Exhibit 03, Exhibit 04. While it is completely irrelevant to this Motion for Summary Judgment, it is perhaps worth noting as background that Academy does not claim to know whether the particular magazine included in the AR-556 rifle's packaging was among the *fifteen* magazines that Kelley reportedly left empty in his attack in Sutherland Springs. *See* Eli Rosenberg, Mark Berman, and Wesley Lowery, Texas church gunman escaped mental health facility in 2012 after threatening military superiors, Washington Post, Nov. 7, 2017, https://www.washingtonpost.com/news/post-nation/wp/2017/11/07/as-texas-town-mourns-details-emerge-on-gunmans-methodical-tactics-in-church-massacre. Plaintiffs also do not claim to know that, and they certainly cannot prove that Academy sold any of the magazines used by Kelley in his attack.

[19] *See, e.g.*, Exhibit 03, Braden Petition, at ¶¶ 10-11.

[20] *Id.*

[21] *See* http://ruger-docs.s3.amazonaws.com/ar-556Compare.pdf.

In sum, this motion will show that the PLCAA requires the immediate dismissal of this case. Academy will not rely on any disputed, unknown, or unknowable facts. Instead, the arguments below use statutes and undisputed facts to prove that Plaintiffs' *legal* arguments are unfounded.

III. ARGUMENT AND AUTHORITIES

A clear legal framework compels summary judgment in this case:

(1) Federal law bars all lawsuits against firearm sellers seeking damages or other relief from the criminal or unlawful misuse of firearms by third parties, except for certain enumerated exceptions;

(2) The exception for "negligent entrustment" cannot apply because Texas refuses to hold sellers liable for "negligent entrustment"; and

(3) The exception for statutory violations (the "predicate exception") does not apply because Academy did not violate any statute applicable to the sale or marketing of qualified products by selling a 30-round magazine to Kelley in Texas.

A. The PLCAA Bars Lawsuits Like This One, Which Would Hold A Firearms Dealer Liable For Damages Caused By The Purchaser's Later Criminal or Unlawful Misuse Of The Firearm.

This Court must begin with the federal statute that Congress enacted to prevent lawsuits like these, against federally licensed firearm dealers like Academy seeking damages or other relief resulting from the criminal or unlawful misuse of firearms by third parties. That statute compels immediate dismissal of all of Plaintiffs' claims unless Plaintiffs can satisfy one of the specifically enumerated exceptions to that statute. Plaintiffs do not properly *allege* any such exception, and they certainly cannot prove one.

In 2005, Congress passed the PLCAA out of its stated concern that firearm dealers were being unjustly sued "for the harm caused by the misuse of firearms by third parties, including

criminals." 15 U.S.C. § 7901(a)(3). "The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty," and otherwise burdens industries and commerce in the United States. 15 U.S.C. § 7901(a)(6).

Accordingly, the PLCAA prohibits civil lawsuits for damages against firearms sellers like Academy, through very straightforward language: "A qualified civil liability action **may not be brought** in any Federal or State court." 15 U.S.C. § 7902(a) (emphasis added). Plaintiffs' lawsuits come within the PLCAA's definition of these terms:

- "Qualified civil liability action." These cases are civil actions brought against the "seller" of a "qualified product" for damages resulting from the criminal or unlawful misuse of a "qualified product" by the person or a third party. 15 U.S.C. § 7903(5).
- "Seller." Because Academy is a federal firearms dealer licensed under 18 U.S.C. § 921(a)(11), it is a "seller" under the PLCAA.[22] 15 U.S.C. 7903(6)(b).
- "Qualified product." "Qualified products" are defined to include "firearms" that are shipped or transported in interstate commerce,[23] and the AR-556 rifle meets that definition because it shoots ammunition—that is, it "expel[s] a projectile by the action of an explosive."[24] 15 U.S.C. § 7903(4). Notably, a "qualified product" under the PLCAA

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[22] Exhibit 05, Business Records Affidavit, at ¶ 8; Exhibit 08, Federal Firearms License for Academy Store 41.

[23] The Ruger AR-556 rifle was necessarily transported in interstate commerce because it was sold in San Antonio, Texas but manufactured in a different state. *See* https://ruger.com/corporate/PDF/10K-2017.pdf (disclosing manufacturing locations, all of which are outside Texas).

[24] More precisely, the PLCAA defines a "qualified product" as a "firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce." 15 U.S.C. § 7903(4). In turn, Section 921(a)(3)(A) & (B) define a "firearm" as: "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon..." 18 U.S.C. § 921(a)(3).

is broader than just a "firearm"—the term is defined to also include "a component part of a firearm or ammunition…." *Id.*

In their various petitions, Plaintiffs allege Academy (a "seller") was negligent in selling Kelley an AR-556 rifle with a detachable 30-round magazine (both "qualified products").[25] Accordingly, the PLCAA declares that this lawsuit "may not be brought." 15 U.S.C. § 7902(a). This Court must enforce this federal ban and dismiss the Plaintiffs' lawsuits.

B. The PLCAA Has Narrow Exceptions, But None Apply Here.

To avoid the PLCAA's ban on even filing lawsuits like these, the Plaintiffs must establish that their claims come within one of its narrow exceptions. Only two PLCAA exclusions could even arguably apply here:

> (ii) an action brought against a seller for negligent entrustment or negligence per se;
>
> (iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought. . . .

15 U.S.C. § 7903(5)(A).[26] In other words, Plaintiffs' claims must be immediately dismissed unless Plaintiffs can support a valid claim for: (1) negligent entrustment; (2) negligence per se; or (3) knowing violations of state or federal law applicable to the sale or marketing of the firearm. Given the undisputed facts of this case, none of these exceptions apply, and Plaintiffs cannot carry their summary judgment burden to prove otherwise.

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[25] *See* Exhibit 01, Exhibit 02, Exhibit 03, Exhibit 04.

[26] The other enumerated exceptions do not apply because (1) Academy has not been convicted of a violation of 18 U.S.C. § 923(h); (2) Plaintiffs' claims are not for breach of contract or warranty in connection with the purchase of the firearm; (3) Plaintiffs' causes of action are not based on an alleged defect in the design or manufacture of the firearm; and (4) these are not actions commenced by the Attorney General to enforce the provisions of chapter 44 of title 18 or chapter 53 of title 26. *See* 15 U.S.C. § 7903(5)(A)(i),(iv)-(vi).

C. Negligent Entrustment Does Not Apply To Sellers Pursuant To Texas Law.

This Court can quickly dispense with the first of these possible exceptions to the PLCAA because Texas law forbids it. Though Plaintiffs assert a Texas state law claim against Academy for negligent entrustment,[27] and the PLCAA allows claims for negligent entrustment (under certain limited circumstances not present here) if that claim is viable under state law, Texas law does not allow negligent entrustment claims on facts like these. This Court must grant summary judgment on this claim because Kelley *bought* the firearm from Academy; he did not *borrow* it.

Generally speaking, "negligent entrustment" occurs when an owner entrusts property to an incompetent person that acts negligently. *See 4Front Engineered Solutions, Inc. v. Rosales*, 505 S.W.3d 905, 909 (Tex. 2016). But Texas does not recognize a claim for negligent entrustment based on the *sale* of property. *National Convenience Stores, Inc. v. T.T. Barge Cleaning Co.*, 883 S.W.2d 684, 686 (Tex. App.—Dallas 1994, writ denied); *Salinas v. General Motors Corp.*, 857 S.W.2d 944, 948 (Tex. App.—Houston [1st Dist.] 1993, no writ); *Rush v. Smitherman*, 294 S.W.2d 873, 875 (Tex. Civ. App.—San Antonio 1956, writ ref'd). For example, Texas courts insisted on this distinction between selling and lending even when a seller sold a vehicle to a buyer that was clearly unable to drive safely. *Salinas*, 857 S.W.2d at 948.

This limitation in Texas law is conclusive because the PLCAA does not create new law for the exempted causes of action. The PLCAA explicitly states that "no provision of this chapter shall be construed to create a public or private cause of action or remedy." 15 U.S.C. § 7903(5)(C); *see also Soto v. Bushmaster Firearms, Int'l, LLC,* No. FBT-CV-15-6048103-S, 2016 WL 8115354, at *4 (Conn. Super. Ct. Oct. 14, 2016).

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[27] Exhibit 01, Ward/Lookingbill Petition, at ¶ 24; Exhibit 02, Solis/Ramirez Petition at p.4; Exhibit 03, Braden Petition, at ¶ 25; Exhibit 04, McMahan/White/Holcombe Petition, at ¶ 27.

This rule compels summary judgment on the Plaintiffs' claim of negligent entrustment.[28] Academy sold the AR-556 rifle; it did not lend it.[29] Accordingly, Academy cannot be liable for "negligent entrustment" under Texas law, and the first possible PLCAA exception fails.

D. The Remaining PLCAA Exceptions Require A Specific Statutory Violation, But Plaintiffs' Petitions Specify No Statutes Allegedly Violated By Academy.

In their petitions, Plaintiffs do not allege negligence per se, the second possible exception to the PLCAA's explicit lawsuit ban. Negligence per se requires a plaintiff to allege that the defendant failed to meet a duty of care created in a statute or ordinance, that the plaintiff belongs to the class of persons the statute was designed to protect, and that the statute was one for which tort liability may be imposed when violated, among other requirements. *Nixon v. Mr. Property Mgmt. Co., Inc.*, 690 S.W.2d 546, 549 (Tex. 1985); *Perry v. S.N.*, 973 S.W.2d 301, 305 (Tex. 1998). Plaintiffs' petitions do not allege a violation of any particular *statute*, so they do not even attempt to claim negligence per se.

For the same reason, Plaintiffs' petitions do not specifically identify any statute by name that Academy knowingly violated, which is the third and final possible exception to the PLCAA's ban on lawsuits. 15 U.S.C. § 7903(5)(A)(iii). They allege that Academy "fail[ed] to follow applicable law in the marketing and sale of firearms," but do not name the law that was allegedly violated.[30]

Instead, the Plaintiffs' petitions allege a series of generic negligence claims, while also vaguely referencing certain statutory concepts. The following sections demonstrate that this

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[28] Accordingly, there is no need for this Court to address the second step of the PLCAA's negligent-entrustment analysis, which would ask whether the Plaintiffs' Texas-law claim will also satisfy the PLCAA's requirement that the firearm seller "knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B).

[29] Exhibit 05, Business Records Affidavit, at ¶ 7; Exhibit 09, Transaction Display for the Sale of the AR-556 Rifle.

[30] Exhibit 01, Ward/Lookingbill Petition, at ¶ 18; Exhibit 02, Solis/Ramirez Petition at p.3; Exhibit 03, Braden Petition, at ¶ 19; Exhibit 04, McMahan/White/Holcombe Petition, at ¶ 21.

Court must dismiss all of these claims, because none of them state a valid claim for negligence *per se* or knowing violation of a specific state or federal statute, as required to survive the PLCAA's ban.

E. The PLCAA Requires This Court To Dismiss The Plaintiffs' General Negligence Claims.

This Court must dismiss the Plaintiffs' theories of generic negligence because they do not fall within an enumerated exception to the PLCAA, as they are not claims for negligence *per se*, nor do they contend that Academy knowingly violated a state or federal statute applicable to the sale or marketing of qualified products. 15 U.S.C. § 7903(5)(A). The PLCAA "preempts and displaces conflicting state law" like the claims alleged by Plaintiffs. *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174, 182 (D.D.C. 2009); *see also Ileto v. Glock, Inc.*, 565 F.3d 1126, 1139-40 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 395-96 (2d Cir. 2008). As the Ninth Circuit explained in *Ileto*,

> Congress clearly intended to preempt common-law claims, such as general tort theories of liability" and explained that: "[This] conclusion is bolstered by Congress' inclusion of the second exception to preemption: The PLCAA does not preempt claims against a seller of firearms for negligent entrustment or negligence per se. **That exception demonstrates that Congress consciously considered how to treat tort claims. While Congress chose generally to preempt all common-law claims, it carved out an exception for certain specified common-law claims.**

Ileto, 565 F. 3d at 1135 n.6 (internal citations omitted) (emphasis added).[31]

For example, Plaintiffs' petitions allege a claim for generic "negligence," based on a supposed duty to "ensure the safety, care, and well-being of the public."[32] They also claim

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[31] A number of other courts that have addressed the issue have also held that the PLCAA prohibits common law negligence causes of action against a manufacturer or seller of firearms where plaintiff's injuries resulted from the criminal use of a firearm. *See, e.g.*, *Adames v. Sheahan*, 909 N.E.2d 742 (Ill.), *cert. denied sub nom*, *Adames v. Beretta U.S.A. Corp.*, 130 S. Ct. 1014 (2009); *Ryan v. Hughes-Ortiz*, 959 N.E.2d 1000 (Mass. App. Ct. 2012); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163 (D.C. 2008), *cert. denied*, 129 S. Ct. 1579 (2009); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007); *Gilland v. Sportsmen's Outpost, Inc.*, No. X04CV095032765S, 2011 WL 2479693 at *1 (Conn. Super. Ct. May 26, 2011).

"negligent hiring, training, and supervision" based on the same vague duty to protect the public safety.[33] The PLCAA not only bars such claims, it declares them to be *abuse*—"imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system…." 15 U.S.C. § 7901(a)(6). While the Plaintiffs deserve compassion, and Devin Kelley deserves contempt, the PLCAA commands that this Court must dismiss all claims of general "negligence" or "negligent hiring, training, and supervision" against Academy that have no connection to a specific statute.

The Plaintiffs' petitions also allege that Academy was negligent because it "fail[ed] to conduct a proper background check," but Plaintiffs allege no facts in their petitions to support this contention, much less a particular state or federal statute that Academy supposedly violated.[34] The summary judgment record is conclusive and undisputed on the facts of Kelley's purchase: Academy did everything legally required when performing its background check of Kelley, and the federal NICS database system instructed Academy to "Proceed" with the sale.[35]

The Plaintiffs' petitions also allege that Academy was negligent because it failed to follow its own "policies and procedures."[36] This is a red herring—Plaintiffs have not and cannot identify any *statute* that imposes liability on a firearms retailer for failing to follow its own "policies and procedures," and Plaintiffs can only evade the PLCAA if they identify a *statute*

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[32] *Id.*

[33] Exhibit 01, Ward/Lookingbill Petition, at ¶¶ 21-22; Exhibit 02, Solis/Ramirez Petition at p.3-4; Exhibit 03, Braden Petition, at ¶¶ 22-23; Exhibit 04, McMahan/White/Holcombe Petition, at ¶¶ 24-25.

[34] Exhibit 01, Ward/Lookingbill Petition, at ¶ 18; Exhibit 02, Solis/Ramirez Petition at p.3; Exhibit 03, Braden Petition, at ¶ 19; Exhibit 04, McMahan/White/Holcombe Petition, at ¶ 21.

[35] Exhibit 05, Business Records Affidavit, at ¶ 6; Exhibit 07, Proceed Notification from NICS Background Check for the Sale of the AR-556 Rifle to Devin Kelley.

[36] Exhibit 01, Ward/Lookingbill Petition, at ¶ 18; Exhibit 02, Solis/Ramirez Petition at p.3; Exhibit 03, Braden Petition, at ¶ 19; Exhibit 04, McMahan/White/Holcombe Petition, at ¶ 21.

violated by Academy. Accordingly, the PLCAA bars this vague contention, and this Court must immediately dismiss these claims.

F. Plaintiffs' Assertion About Interstate Sale Or Transportation Of Firearms Does Not Allege A Violation Of Any Current Statute.

Plaintiffs' petitions include vague assertions that appear to track an old statute that was repealed, though they do not actually cite that old statute, do not plead negligence per se, and do not bother explaining why these assertions would escape the PLCAA's ban.[37]

Plaintiffs allege that Academy could not have sold a firearm to Kelley because "Kelley's identification indicated he was a resident of Colorado—not Texas" and thus Academy should not have sold Kelley the rifle because "[t]he Ruger never should have been placed in Kelley's hands in Texas" but should have instead been "transferred … to Colorado" for Kelley to retrieve, or alternatively, "it would be illegal for Kelley to ever transport that gun to his residence" in Colorado.[38] This Court must reject these allegations as a matter of law because they do not describe a violation of any current statute.

There was nothing improper about Academy "plac[ing the rifle] in Kelley's hands in Texas" instead of "transfer[ring it] to Colorado" because in 1986, Congress changed the law regarding rifle sales to out-of-state purchasers. The current version of 18 U.S.C. § 922—which was in effect at the time of the sale—*expressly permits* dealers like Academy to directly sell rifles to residents of other states. 18 U.S.C. § 922(b)(3) states that:

> It shall be unlawful for any . . . licensed dealer . . . to sell or deliver . . . any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in . . . the State in which the licensee's place of business is located, **except that this paragraph . . . shall not apply to the sale or delivery of any rifle . . . to a resident of a State other than a State in which the**

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[37] Exhibit 01, Ward/Lookingbill Petition, at ¶ 16; Exhibit 02, Solis/Ramirez Petition at p.2; Exhibit 03, Braden Petition, at ¶¶ 13-15; Exhibit 04, McMahan/White/Holcombe Petition, at ¶¶ 14-17.

[38] *Id.*

> **licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States.**

18 U.S.C. § 922(b)(3) (emphasis added). Accordingly, contrary to Plaintiffs' contentions, Academy did not violate any statute by placing the rifle in Kelley's hands in Texas, and it had no statutory obligation to ship the rifle to Colorado for delivery.

The Ward Plaintiffs also appear to allege that Academy is somehow liable because it was possible that Kelley might take the AR-556 rifle back to Colorado in a manner that violates Colorado law.[39] But here too, Plaintiffs will not and cannot cite any statute violated by Academy. Several principles demonstrate that the PLCAA requires this Court to dismiss this claim:

First, 18 U.S.C. § 922(b)(3) does not regulate what the buyer does with the rifle after the sale. Plaintiffs cannot identify any statute imposing liability on a seller for the possibility that the buyer might transport the firearm in the future.

Second, federal law generally allows residents of one state to take home a firearm lawfully purchased in another state. 18 U.S.C. § 926A. The AR-556 rifle itself is legal in Colorado.

Third, the Ward Plaintiffs' assertion about transporting the firearm confuses statutes governing the *buyer* with statutes governing the *seller*. If some law prohibited Kelley from "transport[ing]" the AR-556 rifle from Texas to Colorado, as the Ward Plaintiffs suggest,[40] *Kelley* would be the one violating that law, not Academy. For example, if it was unlawful for Kelley to possess or purchase a firearm (as asserted by the Department of Defense Inspector

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[39] Exhibit 01, Ward/Lookingbill Petition, at ¶ 16.

[40] Exhibit 01, Ward/Lookingbill Petition, at ¶ 16.

General and the McMahan/White/Holcombe Plaintiffs[41]), Academy has nevertheless conclusively shown that it complied with all laws governing *sellers* of firearms. Kelley filled out ATF Form 4473 in a way that provided no reason to halt the sale, and the NICS background check returned a "Proceed" notification to Academy.[42] Because Plaintiffs cannot identify any statute that Academy violated as a seller of firearms, they pleaded no valid exception to the PLCAA, and their lawsuit must be dismissed.

G. Academy Did Not Violate The Federal Statute Governing The Sale Of Firearms To Out-Of-State Residents.

Finally, in hearings and depositions, Plaintiffs have stated that they will argue that Academy's sale of a 30-round magazine to Kelley in Texas violated state or federal law—though their petitions do not actually plead negligence *per se* or that Academy knowingly violated this particular statute, as would be necessary for them to avoid the PLCAA's ban. They did not properly plead this argument because it crumbles under the PLCAA's legal scrutiny.

Ruger includes a detachable 30-round magazine manufactured by Magpul in the standard packaging for the AR-556 rifle that Academy sold to Kelley in Texas.[43] Plaintiffs will argue that Academy's sale of the 30-round magazine in Texas violated a Colorado statute (Colo. Rev. Stat. § 18-12-302) prohibiting the sale *in Colorado* of magazines with capacities exceeding 15 rounds. Notably, Federal and Texas law impose no restriction on the sale of magazines, and the sale of the AR-556 rifle itself was legal under Colorado, Texas, and federal law. Plaintiffs' entire

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[41] Exhibit 04, McMahan/White/Holcombe Petition, at ¶ 19; Report of Investigation into the United States Air Force's Failure To Submit Devin Kelley's Criminal History Information to the Federal Bureau of Investigation, *available at* https://media.defense.gov/2018/Dec/07/2002070069/-1/-1/1/DODIG-2019-030_REDACTED.PDF ("This conviction should have prevented Kelley from purchasing a firearm from a licensed firearms dealer.").

[42] Exhibit 05, Business Records Affidavit, at ¶ 6; Exhibit 06, Form 4473 for the Sale of the Ruger AR-556 Rifle to Devin Kelley; Exhibit 07, Proceed Notification from NICS Background Check for the Sale of the AR-556 Rifle to Devin Kelley.

[43] *See* https://ruger.com/products/ar556/specSheets/8500.html.

argument depends on a supposed obligation to follow Colorado's law regarding magazine sales in Colorado when conducting a sale in Texas to a Colorado resident.

Plaintiffs' allegation that Academy violated a statute fails for two primary reasons:

1) Colorado state law does not reach into Texas. Colorado state law does not prohibit magazine sales in Texas to Colorado residents. To the contrary, Colorado expressly *permits* the sale of 30-round magazines outside the state of Colorado. Federal law does not extend Colorado state law any further than the Colorado Legislature intended, and Colorado only prohibits the sale of 30-round magazines *within the state of Colorado*.

2) Section 922(b)(3) restricts the sale of "firearms," and a magazine is not a "firearm." The sale does not violate 18 U.S.C. § 922(b)(3), the federal statute governing the sale of firearms to residents of other states. That statute only applies to the sale of "firearms," and magazines do not come within the statutory definition of "firearms." The Plaintiffs fail to allege an exception that prevents the immediate dismissal of this lawsuit pursuant to the PLCAA.

These arguments are conclusive, but even if Plaintiffs tried to muddy the waters, the rule of lenity in statutory construction would nevertheless compel summary judgment in Academy's favor. All these principles compel this Court to grant summary judgment, immediately dismiss this case, and grant Academy the immunity that the PLCAA provides.

1. Academy Did Not Violate State Law, Because Colorado's Restrictions On Magazine Sales Do Not Reach Into Texas.

First, Colorado state law does not prohibit the sale of a 30-round magazine in Texas to a Colorado resident.

By its own language, Colo. Rev. Stat. § 18-12-302 permits the sale of 30-round magazines outside Colorado. While Section 18-12-302(1)(a) says that "a person who sells, transfers, or possesses a large-capacity magazine commits a class 2 misdemeanor," subsequent provisions of the same statute demonstrate that the Colorado Legislature limited that offense to its own borders and allowed the sale of 30-round magazines in other states. Section 3 explicitly exempts all federally licensed firearms dealers from the state's magazine restrictions if the firearms dealer sells the otherwise prohibited magazines to "an out-of-state transferee who may legally possess a large-capacity magazine." Colo. Rev. Stat. § 18-12-302(3). In such situations, the offense described in subsection (1) "shall not apply." *Id.* (emphasis added); *see also* the Colorado Senate Judiciary Committee's March 4, 2013 Bill Summary for HB13-1224 ("The prohibition against the transfer or possession of these magazines does not apply to…a firearms retailer for the purposes of sales outside of Colorado, [or] an out-of-state transferee who is legally allowed to possess the magazine…"). By its express terms, then, this Colorado statute was not violated by the sale in Texas of a magazine with a 30-round capacity.

Plaintiffs cannot defeat this straightforward result by trying to blur the distinctions between the magazine and the AR-556 rifle. Plaintiffs would achieve nothing by arguing that Academy should have sold a different "model number" to Kelley (with a different magazine in the box), or that the magazine should be considered part of the AR-556 rifle itself. These arguments are irrelevant because the AR-556 rifle is lawful in both Colorado and Texas, and no Colorado or Texas state law forbids the sale of a 30-round magazine in Texas to a Colorado resident. Whether bundled together or considered apart, the Texas sale of a rifle and/or a 30-round magazine offended no Colorado statute.

Accordingly, Academy cannot have violated Colorado or Texas state law by selling Kelley a Ruger AR-556 rifle with a detachable 30-round magazine included with the rifle's packaging. Colorado's magazine law goes no further than the Colorado state line—it does not reach across seven hundred miles to govern the sale of a 30-round magazine in San Antonio, Texas to a Colorado resident.

2. Academy Did Not Violate Federal Law, Because 18 U.S.C. § 922 Applies To "Firearms," Not Magazines.

Second, Plaintiffs have indicated they will argue that Academy violated 18 U.S.C. § 922(b)(3), which prohibits federally licensed firearm dealers from selling "firearms" to a resident of another state, except that it permits the sale of a "rifle" like the Ruger AR-556 if the sale "fully compl[ies] with the legal conditions of sale in both states" (here, Texas and Colorado).

Academy did not violate Section 922(b)(3) because that statute only restricts the sale of "firearms." "Firearm" is a statutory term of art that does not include interchangeable "magazines" any more than it includes "ammunition." Magazines are not even sold in the same manner as "firearms." No law requires Academy to check identification or perform a background check when selling a magazine, so Academy would not have reason to inquire about a magazine purchaser's state of residence. One of the reasons why magazines are sold differently than "firearms" is because they are not included in the federal definition of a "firearm" used in Section 922(b)(3).

The statutory text speaks for itself, and it speaks plainly. 18 U.S.C. § 922(b)(3) only restricts the sales of "firearms." The statutory definition of "firearm" conspicuously omits interchangeable "magazines," as well as all other parts except for frames or receivers. "Firearm" is defined as "(A) any weapon (including a starter gun) which will or is designed to or may

readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device." 18 U.S.C. § 921(a)(3).[44]

In interpreting this very same statutory provision, the Fifth Circuit held that a magazine "plainly" does not come within this definition of a "firearm." *United States v. Guillen-Cruz*, 853 F.3d 768, 772-73 (5th Cir. 2017). In that case, the district court enhanced a convicted criminal's sentence because he had a prior conviction for willfully exporting "high-capacity rifle magazines" without a license, and the later presentence report characterized that prior conviction as an "aggravated felony." *Id.* at 770. But the Fifth Circuit reversed. An "aggravated felony" required trafficking a "firearm" (or other statutory violations not relevant here). *Id.* at 772. And under Section 921(a)(3), the Court held, "a rifle magazine plainly is not a 'firearm' or 'the frame or receiver' of a firearm or a 'muffler or firearm silencer.'" *Id.* (quoting 18 U.S.C. § 921(a)(3)).

The same analysis applies here. Because a "magazine" plainly does not come within the statutory definition of a "firearm" in Section 921(a)(3), Section 922(b)(3) does not prohibit Academy's sale of a 30-round magazine to Kelley.

This Court can be further assured that Congress did not intend magazines to be included in the term "firearm" because Congress omitted them from its precise definition. See *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) ("[E]very word excluded from a statute must . . . be presumed to have been excluded for a purpose."); *Dean v. U.S.*, 556 U.S. 568,

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[44] Though the federal statute's definition of a "firearm" is the only one that matters here—federal law is the only thing that could potentially extend Colorado law into Texas—it is worth noting that Colorado law also omits magazines from its definition of a "firearm." It employs a definition much like the federal statute's: "(a) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (b) the frame or receiver of any such weapon; (c) any firearm muffler or firearm silencer; or (d) any destructive device. Such term does not include an antique firearm." Colorado Department of Public Safety, Colorado Bureau of Investigation Rules and Regulations, CBI-IC-1 (Definitions); *compare* Colo. Rev. Stat. § 18-12-301(2)(a) (defining "large capacity magazine"); *Colorado Outfitters Assoc. v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo. 2014), *rev'd on other grounds*, 823 F.3d 537 (10th Cir. 2016) ("Section 18-12-302 is interesting in that it does not directly regulate firearms at all; it regulates only the size of a magazine.").

572 (2009) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."). In 18 U.S.C. § 921(a)(3), Congress defined "firearm" to include the "frame" and "receiver" of the weapon, and to reach beyond the weapon itself to include "silencers," but conspicuously did not include magazines or other ammunition-feeding devices.

Congress's omission of magazines is conspicuous, because Congress expressly addressed ammunition and magazines in other sections of 18 U.S.C. § 922. *Dean*, 556 U.S. at 573 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). For example, 18 U.S.C. § 922(b)(1) prohibits the sale of firearms *or ammunition* to persons under 18 or 21, depending on the type of ammunition. 18 U.S.C. § 922(b)(1). And a now-repealed provision in 18 U.S.C. § 922 prohibited the transfer or possession of a "large capacity ammunition feeding device," defining that term as a "magazine, belt, drum, feed strip, or other similar device . . . that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition." 18 U.S.C. §§ 921(a)(31) & 922(w) (effective Sept. 13, 1994 to Sept. 13, 2004). But Congress chose not to include magazines in the definition of "firearm." This Court must conclude that Congress did not intend to require sellers in Texas (like Academy) to comply with laws regarding the sale of magazines in other states, such as Colo. Rev. Stat. § 18-12-302.

Plaintiffs have indicated they will argue that a "magazine" is part of a "firearm" under the U.S. Supreme Court's fragmented decision in *U.S. v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 (1992), but that case has no relevance here. That opinion dealt with the National Firearms Act ("NFA," 26 U.S.C. § 5845), a very different statute that heavily regulates and taxes a narrow class of weapons determined by Congress to be readily used by criminals or gangsters, including

fully-automatic machine guns and short-barreled rifles, but *not* including the AR-556 rifle. *Id*. at 506-07, 516-17.[45] While the NFA applies to what it defines as "firearms," the Supreme Court noted that "the word 'firearm' is used as a term of art in the NFA." *Id*. at 507. That special definition has no relevance here. Moreover, the actual holding of *Thompson/Center Arms* is irrelevant to the issues in this case. It concerned whether a manufacturer had to pay the NFA tax on a collection of mechanical parts when those parts could be assembled (or "made," another term of art) in various ways that did or did not meet the NFA's special definition of a short-barreled "rifle." *Thompson/Center Arms*, 504 U.S. at 507. That holding is irrelevant because it does not: (1) address the role of magazines or other ammunition-feeding devices; (2) address the definition of a "firearm" under 18 U.S.C. § 922 or the PLCAA; or (3) override the limits in Congress's express definitions under those separate statutes. And at any rate, a magazine is very different from the parts discussed by the Court in *Thompson/Center Arms* because the AR-556 rifle can be used without a magazine at all. *See id*. at 510-12 (discussing whether the parts were "useless" for any other purpose). Ammunition can be loaded directly into the chamber of the firearm without the aid of a magazine. *See, e.g.*, *Colorado Outfitters Assoc. v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo. 2014)[46] ("Here, the Plaintiffs are concerned primarily with semiautomatic firearms. Such firearms can operate without a magazine, but each round must be individually loaded.").

Plaintiffs also cannot argue that Colorado law applies by characterizing the magazine as a "component" of the AR-556 rifle, because that concept is meaningless to the relevant statutory definition of a "firearm." *See* 18 U.S.C. § 921(a)(3). The federal statute's definition of a

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[45] *See* ATF National Firearms Act Handbook 1.1.1 (describing Congress's original intent to "curtail, if not prohibit, transactions in NFA firearms" because "of their frequent use in crime"), *available at* https://www.atf.gov/firearms/national-firearms-act-handbook.

[46] *Rev'd on other grounds*, 823 F.3d 537 (10th Cir. 2016).

"firearm" specifically includes "frames" and "receivers," and "silencers," but not "magazines" or "ammunition feeding devices." *See id.*; *see also supra*. Plaintiffs have indicated they will cite to other materials that have referred to magazines as "components" of a rifle or "parts" of a rifle for various purposes, but none of these materials will change the very narrow and precise definition of a "firearm" in 18 U.S.C. § 921(a)(3).

The text of the PLCAA supports the same conclusion. Congress broadly extended the PLCAA's protections to sellers of "qualified products," which it defined to include not only "firearms" as defined in Section 921, but also "component parts" of "firearms" such as magazines. 15 U.S.C. § 7903(4). If a PLCAA "component part" like a magazine were already part of the definition of a "firearm" in Section 921, the additional provision for "component parts" would be surplusage—and courts must not construe statutes in a way that creates surplusage. *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016). The reverse is also true. The inclusion of "component parts" in the PLCAA makes it all the more conspicuous that Section 921(a)(3) defines a "firearm" to include "frames" and "receivers" and "silencers" but not "component parts." 18 U.S.C. § 921(a)(3). Through this distinction between "component parts" and "firearms." Congress manifested its intent to provide broad immunity for legal firearm sales, and prevented plaintiffs from trying to negate that immunity by claiming their lawsuit is based on some specific part of a rifle that does not come within Section 921(a)(3)'s definition of a "firearm." *Id.*

In sum, even though a magazine is a "component part" in the sense that the PLCAA immunizes the sellers of magazines and similar "qualified products" from suit, a magazine nevertheless falls outside the scope of a "firearm" in Section 922(b)(3). Accordingly, Academy cannot have violated Section 922(b)(3) by selling a 30-round magazine to Kelley, and Plaintiffs

have not supported a valid exception to the PLCAA's immunity from suit. The PLCAA compels this Court to immediately dismiss this case.

3. The Rule Of Lenity Requires This Court To Construe The Statute In Academy's Favor.

Finally, even if the Plaintiffs try to dispute or contort the interpretation of Section 922(b)(3), this Court would have to grant summary judgment to Academy anyway. There can be no valid dispute over the meaning of Section 922(b)(3). But even if there were, this Court *must* resolve that dispute in Academy's favor as a matter of law. Where a penal statute remains uncertain after applying the ordinary rules of statutory construction, the rule of lenity requires the court to construe the statute in a way that will not impose liability. *See Thompson/Center Arms*, 504 U.S. at 518. The rule of lenity applies to civil cases like this one. *See id.* at 517-18 & n. 10 (plurality). 18 U.S.C. § 922 is a penal statute, so the rule of lenity requires the Court to construe the statute narrowly in favor of Academy. *Id.* at 517; 18 U.S.C. § 924(a)(1)(D).

The Plaintiffs' efforts to misconstrue Section 922(b)(3) are thus doomed to failure. They will cite no authority for their misinterpretations, and moreover, all doubts must be resolved in Academy's favor. This Court must conclude that the Plaintiffs have not supported any exception to the PLCAA, and dismiss this lawsuit.

H. The Court Should Act Now To Resolve This Question of Law in Academy's Favor.

Finally, the Court should *immediately* grant Academy's Motion for Summary Judgment against all of the Plaintiffs' claims. This Motion presents purely legal questions that must be resolved by a court. The PLCAA requires this Court to resolve those legal questions *now*, without additional delay and expense, because it compels that lawsuits like these "may not be brought" at all because they are an "abuse of the legal system." 15 U.S.C. §§ 7901(a)(6), 7902(a).

IV. CONCLUSION & PRAYER

Accordingly, Academy requests that the Court issue a final summary judgment that Plaintiffs take nothing on their claims against Academy, and dismiss this lawsuit as the PLCAA requires.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT ACADEMY LTD. D/B/A ACADEMY SPORTS + OUTDOORS

FIAT OF ORAL HEARING

Please take note that this Motion is set for oral hearing on January 31, 2019 at 8:30 a.m. in the District Court of Bexar County in the Presiding Court, Room 109 at 100 Dolorosa, San Antonio, Texas 78205.

1/09/2019
ANTONIA ARTEAGA
DISTRICT JUDGE
57TH DISTRICT COURT

Presiding Judge

/s/ Nicholas J. Demeropolis
Nicholas J. Demeropolis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel ***via hand delivery, facsimile, electronic notification, and/or certified mail return receipt requested*** on January 9, 2019.

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Exhibit 01

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF R.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR;	§	IN THE DISTRICT COURT OF
	§	BEXAR COUNTY, TEXAS
Plaintiffs	§	
Vs.	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS	§	224th JUDICIAL DISTRICT
Defendant	§	

PLAINTIFFS' SECOND AMENDED PETITION AND REQUEST FOR DISCLOSURE

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Chris Ward, Individually and as Representative of the Estates of Joann Ward, Deceased and B.W., Deceased Minor, and as Next Friend of R.W., a Minor; Robert Lookingbill; and Dalia Lookingbill, Individually and as Guardian of the Person and Estate of R.T., a minor, and as Personal Representative of the Estate of E.G., Deceased Minor, Plaintiffs, complaining of Academy, Ltd. d/b/a Academy Sports + Outdoors, hereinafter collectively referred to as Defendant and/or Academy, and for cause of action would respectfully show the Court the following:

DISCOVERY LEVEL

1. Plaintiffs intend to conduct discovery under Level III of the Texas Rules Civil Procedure §190.3 and the Plan provided by the Court.

PARTIES

2. Plaintiffs Chris Ward, R.W., and R.G. are residents of Wilson County, Texas. Robert Lookingbill and Dalia Lookingbill are residents of Bexar County, Texas. At the time of their death, Joann Ward, E.G. and B.W. were residents of Wilson County, Texas.

3. Defendant, Academy, Ltd. d/b/a Academy Sports + Outdoors, is a domestic corporation headquartered and authorized to do business in Harris County, Texas and has appeared through counsel in this matter.

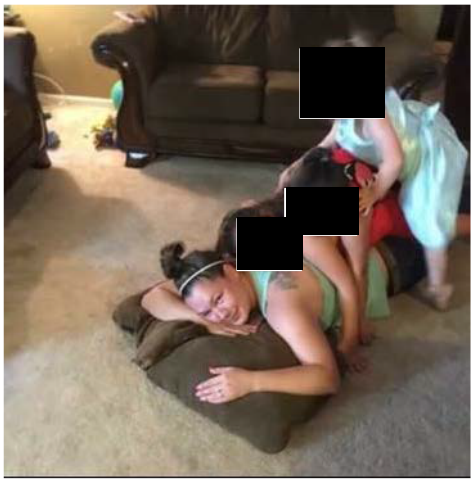
JURISDICTION AND VENUE

4. The Court has jurisdiction over the controversy because damages are within the jurisdictional limits of the Court.

5. Furthermore, venue is proper in Bexar County, Texas under §15.002(a)(1) because it is the county in which all or a substantial part of the events or omissions giving rise to the claims occurred.

FACTS

6. It all begins with family—yours, mine and ours. Chris and Joann Ward were the picture of a blended family. Joann had two daughters, R.G. and E.G., before entering the marriage, and Chris had R.W. Joann and Chris married in 2011 and soon thereafter their daughter B.W. was born. For Joann, her family was her world and Chris was her soulmate.



7. Her "babies" were her everything; it is because of her devotion to her family that it is no surprise that she died, sacrificing herself for her children.

8. On the morning of November 5, 2017, Joann awoke, made breakfast for her family and got the kids dressed for Church. It was her and Chris's sixth wedding anniversary and she wanted to spend the day with her family. Chris, a truck driver, decided to stay home that morning, to sleep in after working a late shift. He promised to meet up with the family later for some much needed family time. Undeterred, Joann packed up her children as she did every weekend and made

the one mile drive to First Baptist Church in Sutherland Springs, the small town the Ward family called home. Joann and Chris family had planned on meeting up after Church for a celebratory picnic—a picnic that would never happen.

"Everybody is gonna fing die!"***

9. Just minutes into the morning church service, Joann, her four children, and the small congregation of First Baptist Church were under siege. Praise and worship songs which had filled the air were interrupted by rapid gunfire. The Church was being attacked.

10. Bullets sprayed through the wooden walls of the tiny church, shattering windows and puncturing holes in the wooden floors. Startled and confused, the congregants soon saw a man dressed in black tactical gear storm in, cursing "Everybody is gonna f***ing die!" His face was covered by a mask with a white skull. As soon as shots rang out, Joann shoved her oldest daughter, R.G., out of the way—to hide—and Joann fell on top of her three youngest children, trying to protect her babies from the hail of bullets filling the Church. R.G.'s eyeglasses would be hit— blown off her face as she fell and crawled underneath a pew seeking cover.

11. The shooter stalked the room—determined to kill everyone in it. When he saw Joann, shielding her young children, he aimed at her—intent on killing her and anyone she was

protecting. When the gunfire ceased and the Shooter ran, nearly half of the congregation had been killed, including Joann and two of her daughters—E.G. and B.W. Another twenty congregants had been injured.

12. Joann's stepson, R.W., had been shot five times. His stomach and groin were pierced, damaging his bladder and kidney; the five year old's arm was so mutilated by bullets it was nearly amputated. Over a month later, R.W. remains hospitalized with several additional surgeries remaining. His shattered femur isn't healing as well as hoped and the young boy's kidneys continue to struggle.

13. Despite his youth and the long road ahead, R.W.'s doctors call him "brave" and a "tough guy." Chris and his in-laws, Robert and Dalia Lookingbill, hope that R.W. is released in time for the holiday—though it's difficult for Chris to imagine Christmas without his wife and daughters.

Academy—The Right Stuff The Right Price

14. Despite having his permit to carry delayed "by a possibly disqualifying issue" in 2015, the Shooter who terrorized the small First Baptist Church of Sutherland Springs, Devin Kelley, (hereinafter "Kelley"), had little difficulty purchasing a Ruger AR-556 rifle and a 30-round magazine from Academy Sporting Goods in San Antonio, in April, 2016.[1] Months later, Kelley would use a Ruger AR-556 assault rifle with a 30-round magazine as he terrorized and brutally murdered 26

innocent people—including Joann Ward, B.W., and E.G. Kelley also used the Ruger with the 30-round magazine when pelting young R.W. with at least five bullets.

15. Academy, a sporting goods and apparel retailer, offers its customers the ease and convenience of purchasing in the store and online. As a licensed dealer, Academy sells 581 different rifles, 401 different pistols, 238 different shotguns, 12 "modern sporting rifles," 133 revolvers, and 2 "black powder guns."[2] It is unclear how Kelley purchased the Ruger AR-556 with the 30-round magazine, but it is undisputed that he used the Ruger in the November 5, 2017 mass shooting.

[1] From 2014 to the day of the shooting, Kelley purchased four guns—two in Colorado and two in Texas. *See* https://patch.com/texas/sanantonio/texas-shooters-gun-permit-delayed-disqualifying-issue.

16. At the time Kelley purchased the Ruger with the 30-round magazine, he reported a Colorado Springs, Colorado address on his Firearms Transaction Record, Form 4473, a federal form. This fact alone should have disqualified Kelley from ever purchasing the assault rifle. Kelley's identification indicated he was a resident of Colorado—not Texas. Thus, he never should have been sold the very weapon and 30-round magazine he used in the Sutherland Springs shooting as it would be illegal for Kelley to ever transport that gun to his residence. Rather, Defendant, upon Kelley

purchasing the weapon, should have transferred the firearm to Colorado, for Kelley, a Colorado resident, to retrieve. The Ruger should have never been placed in Kelley's hands in Texas. Importantly this incident is not the first incident of Academy failing to follow applicable laws—though it is, the first incident that resulted in the deaths of 26 innocent people and injuries to an additional 20 people.[3]

CAUSE OF ACTION NO. 1—NEGLIGENCE

17. Plaintiffs incorporate each of the preceding paragraphs as if fully restated herein in full.

18. At all material times to this suit, Defendant owed Plaintiffs a duty of reasonable care to ensure the safety, care and well-being of the public, including Plaintiffs, and had or assumed a duty to exercise reasonable care in executing such duties. Defendant failed to exercise reasonable care, and such failure was negligent and a proximate cause of the incident in question and resulting damages to Plaintiff. These acts include, but are not limited to, the following:

a. Failing to protect the safety of the public, including the Plaintiffs;

b. Failing to follow policies and procedures in selling a firearm and a 30-round magazine;

[2] *See* https://www.academy.com/shop/browse/shooting/firearms. Academy offers its customers 1295 guns via "ship to store" delivery and 1,111 guns online only. In store, Academy offers a mere 431 guns. *Id*.

[3] *See* http://kfor.com/2017/11/29/metro-man-says-academy-made-big-mistake-when-selling-him-a-gun/.

Failing to properly follow applicable law in the marketing and sale of firearms;

c. Failing to conduct a proper background check; and

d. Other ways to be determined during discovery in this matter.

19. Plaintiffs will show that one or all of the above-mentioned acts and/or omissions constitute negligence and are a proximate cause of the occurrence in question and the injuries and damages resulting to Plaintiff.

CAUSE OF ACTION NO. 2—NEGLIGENT HIRING, TRAINING, AND/OR SUPERVISION

20. Plaintiffs incorporate each of the preceding paragraphs as if fully restated herein in full.

21. At all material times to this suit, Defendant owed Plaintiffs a duty of reasonable care to ensure the safety, care and well-being of the public, including Plaintiffs. These duties include, but are not limited to, the hiring, retention, and supervision of trained employees to ensure that all legally required guidelines are fulfilled at the time of purchasing any firearm. Defendant breached these duties when its employee(s) sold a gun and a 30-round magazine to Kelley in violation of the existing laws.

22. Despite actual or constructive knowledge of its employees to its patrons, Defendant failed to properly supervise and/or control Defendant's actions. Specifically, Defendant's following acts constituted negligence:

a. Entrusting Defendant's employees who lack adequate training and education concerning firearms and governing laws, with the administration and sale of firearms;

b. Failing to properly train employees regarding the appropriate methods, safety practices, and supervision for customers purchasing firearms;

d. Failing to properly supervise, monitor, and/or control employees tasked with selling firearms to the public;

e. Failing to continually monitor and/or screen their employees to ensure they are fit to sell firearms to the public;

f. Failing to appropriately discipline and/or reprimand Defendant employee after the shooting; and

g. Failing to properly screen and perform investigative due diligence on prospective customers prior to selling them firearms.

CAUSE OF ACTION NO. 3—NEGLIGENT ENTRUSTMENT

23. Plaintiffs incorporate each of the preceding paragraphs as if fully restated herein in

full.

24. At all material times to this suit, Defendant owed Plaintiffs a duty of reasonable care to ensure the safety, care and well-being of the public, including Plaintiffs. By selling the gun and 30-round magazine to Kelley without the proper oversight and by failing to follow policies, procedures, and applicable law in selling firearms pursuant to the laws, Defendant supplied Kelley with a dangerous instrumentality that caused the deaths and injuries to Plaintiffs with that instrumentality.

CAUSE OF ACTION NO. 4—GROSS NEGLIGENCE

25. Plaintiffs incorporate each of the preceding paragraphs as if fully restated herein in full.

26. The acts and/or omissions of the Defendant, as set forth herein, was also such knowing and willful failures to abide by the applicable safety guidelines regarding selling and purchasing firearms in the State of Texas, they constitute malicious, willful, wanton, grossly negligent and/or reckless conduct. Said acts and/or omissions proximately caused or contributed to Plaintiffs' injuries as such give rise to, and warrant, the imposition by a jury of significant punitive damages in an amount to the determined by that jury of no more than $25 million dollars against Defendant.

DAMAGES

27. Plaintiffs incorporate each of the preceding paragraphs as if fully restated herein in full.

28. As a direct and proximate result of Defendant's aforementioned tortious conduct, Plaintiffs Dalia Lookingbill, Individually, as Guardian of the Person and Estate of R.T., and as Representative of the Estate of E.G., bring claims as wrongful death beneficiaries, pursuant to Chapter 71 of the Civil Practice and Remedies Code, and have suffered in each of the following ways and seek compensation for each of the following, as applicable:

a. Pecuniary loss sustained in the past by Plaintiffs;

b. Pecuniary loss that, in reasonable probability, will be sustained in the future by Plaintiffs;

c. Loss of spouse's services, including household and domestic services, in the past and in the future;

d. Loss of child's services, in the past and in the future;

e. Loss of parental consortium in the past and future;

f. Loss of companionship and society sustained in the past;

g. Loss of companionship and society that, in reasonable probability, will be sustained in the future;

h. Expenses related to psychological treatment, in the past and in the future;

i. Mental anguish sustained in the past by Plaintiffs;

j. Mental anguish that, in reasonable probability, will be sustained in the future by Plaintiffs; and

k. Funeral and Burial expenses.

29. Plaintiff, Chris Ward as Next Friend of R.W., seeks to recover from Defendant the following elements of damage in regard to the injuries sustained by R.W.:

a. Physical pain and mental anguish sustained in the past;

b. Physical pain and mental anguish that, in reasonable probability, R.W. will sustain in the future;

c. Disfigurement in the past;

d. Disfigurement that, in reasonable probability, R.W. will sustain in the future;

e. Physical impairment sustained in the past;

f. Physical impairment that, in reasonable probability, R.W. will sustain in the future;

g. Medical care expenses incurred in the past;

h. Medical care expenses that, in reasonable probability, R.W. will incur in the future; and

i. Other reasonable consequential damages.

30. Dalia Lookingbill, as Personal Representative of R.G., seeks the following elements of damage in regard to the injuries sustained by R.G.:

a. Physical pain and mental anguish sustained in the past;

b. Physical pain and mental anguish that, in reasonable probability, R.G. will sustain in the future;

c. Disfigurement in the past;

d. Disfigurement that, in reasonable probability, R.G. will sustain in the future;

e. Physical impairment sustained in the past; and

f. Other reasonable consequential damages.

31. Plaintiff Christopher Ward, Individually herein prays for recovery of the following elements of damage:

a. Loss of consortium, companionship and affection as to Joann Ward;

b. Loss of household services as to Joann Ward;

c. Loss on inheritance rights as to Joann Ward;

d. Wrongful Death damages for Joann Ward as per Chapter 71 of the Texas Civil Practice & Remedies Code;

e. Economic damages including but not limited to costs of burial for Joann Ward and B.W.;

f. Loss of consortium, companionship and affection as to Brook Ward;

g. Loss of household services as to B.W.;

h. Wrongful Death damages as to B.W.

i. Reasonable and necessary medical expenses incurred in the past for R.W. and that in all medical probability will be incurred prior to R.W. reaching the age of majority.

j. Loss of services as to R.W.

k. Exemplary Damages;

l. Costs of Court; and

m. Pre-judgment and post-judgment interest at the maximum allowable rates.

32. Plaintiff Christopher Ward as Representative of the Estate of Joann Ward herein prays for recovery of the following elements of damage:

a. Joann Ward's pain and suffering in the moments before her death;

b. Joann Ward's mental anguish in the moments before her death;

c. Joann Ward's lost income incurred in the past and that in all reasonable probability will be incurred in the future;

d. reasonable and necessary medical expenses incurred by Joann Ward;

e. Damages for the wrongful death of Joann Ward;

f. Exemplary damges;

g Costs of Court; and

h. Pre-judgment and post-judgment interests at the maximum allowable rates.

33. Plaintiff Christopher Ward as Representative of the Estate of B.W, herein prays for recovery of the following elements of damage:

a. B.W.'s pain and suffering in the moments before her death;

b. B.W.'s mental anguish in the moments before her death;

c. B.W.'s lost income that in all reasonable probability will be incurred in the future;

d. Damages for the wrongful death of B.W.;

e. Reasonable and necessary medical expenses incurred by B.W.;

f. Exemplary damages;

g. Costs of Court; and

h. Pre-judgment and post-judgment interests at the maximum allowable rates.

34. Plaintiffs reserve the right to plead additional and more specific damages in the future as more facts become known. The above-mentioned elements of damages are those that Plaintiffs have suffered in the past up to the time of trial, but in addition, those that they, in

reasonable probability, will continue to suffer in the future. As such, Plaintiffs affirmatively plead that they seek monetary relief over $25,000,000.00, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees; and a demand for all the other relief to which the party deems himself entitled.

CONDITIONS PRECEDENT

33. All conditions precedent have been performed or have occurred as required by Rule 54 of the Texas Rules of Civil Procedure.

RULE 193.7 NOTICE

34. Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, Plaintiffs hereby give actual notice to Defendant that any and all documents produced may be used against the Defendant producing the document at any pretrial proceeding and/or at the trial of this matter without the necessity of authenticating the documents.

REQUEST FOR DISCLOSURE

35. Pursuant to Rule 194 of the Texas Rules of Civil Procedure, Defendant is requested to disclose the information and material described in Rule 194.2 within **fifty (50) days** of the service of this request.

JURY DEMAND

36. Plaintiffs demand a jury trial.

PRAYER

WHEREFORE PREMISES CONSIDERED, Plaintiffs pray as follows:

a. That Defendant be cited to appear in terms of the law;

b. That upon trial of this cause, Plaintiffs have and recover Judgments in an amount in excess of the minimum jurisdictional requirements of this Honorable Court against Defendant;

c. That Plaintiffs recover economic and non-economic damages;

d. That Plaintiffs recover costs of Court against the Defendant;

e. Court Costs;

f. That Plaintiffs recover pre-judgment and post-judgment interest at the legal rate per annum against Defendant; and, Plaintiffs further pray,

g. That Plaintiffs receive such other and further relief, both at law and in equity, to which Plaintiffs may show themselves to be justly entitled.

Respectfully submitted,

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Fax: (210) 928-9118
kk.aalaw@yahoo.com
ol.aalaw@yahoo.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded via e-filing service, certified mail, return receipt requested, hand delivery and/or facsimile, to all counsel of record herein on this, the 25th day of October 2018.

s/ Jason C. Webster
JASON C. WEBSTER

Exhibit 02

w/ jd

cit pps sac 2

2018CI14368

NO._____

ROSANNE SOLIS and JOAQUIN RAMIREZ	§	**IN THE DISTRICT COURT OF**
	§	
VS.	§	**438th JUDICIAL DISTRICT**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS	§	
	§	
DEFENDANT	§	**BEXAR COUNTY, TEXAS**

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, ROSANNE SOLIS AND JOAQUIN RAMIREZ, Plaintiffs in the above-numbered and styled cause of action, complaining of Defendant, ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS and for cause of action, would respectfully show unto the Court the following:

DISCOVERY LEVEL

Discovery in this case shall be conducted under Level 3 of the Texas Rules Civil Procedure, Rule 190.

PARTIES

Plaintiffs, ROSANNE SOLIS AND JOAQUIN RAMIREZ, are individuals residing in Wilson County, Texas.

Defendant, ACADEMY, Ltd. d/b/a Academy Sports & Outdoors, is a domestic corporation headquartered and authorized to do business in Harris County, Texas and may be served through its Agent for Service of Process, Genetha Turner, at 1540 North Mason Road, Katy, Texas 77449.

JURISIDICTION AND VENUE

The Court has jurisdiction over controversy because damages are within the jurisdictional limits of the Court.

Furthermore, venue is proper in Bexar County, Texas under §15.002 (a) (1) because it is the County in which all or a substantial part of the events or omissions giving rise to the claims occurred.

MR 136

FACTS

On the morning of November 5, 23017, Plaintiffs were attending church at the First Baptist Church of Sutherland Springs, Texas. Just minutes into the morning church service, Plaintiffs and the congregation of First Baptist Church were part of an attack. Startled and confused, Plaintiffs and the congregants soon saw a man dressed in black tactical gear storm in, cursing "everybody is gonna f***ing die!" His face was covered by a mask with a white skull. The shooter stalked the room determined to kill everyone it. When the gunfire ceased, and the shooter ran, nearly half of the congregation had been killed. Another twenty congregants had been injured, including the Plaintiffs.

The Shooter who terrorized the small First Baptist Church of Sutherland Springs, Texas, Devin Kelley (hereinafter "Kelley"), had little difficulty purchasing a Ruger AR-556 rifle from Academy Spring Goods in San Antonio, in April 2016. Kelley used this Ruger assault rifle as he wounded and permanently injured the Plaintiffs.

Academy, a sporting goods and apparel retailer, offers its customers the ease and convenience of purchasing in the store and online. At the time Kelley purchased the Ruger, he reported a Colorado Springs, Colorado address on his Firearms Transaction Record, Form 4473, a federal form. Kelley's identification indicated he was a resident of Colorado-not Texas. Thus, he never should have been sold the very weapon he used in the Sutherland Springs shooting as it would be illegal for Kelley to purchase the same weapon under Colorado Law. No Colorado gun dealer could have sold the same weapon to Kelley under Colorado Law. The Ruger should have never been placed in Kelley's hands in Texas. A Texas gun dealer (Academy) cannot sell a firearm and deliver that firearm to a citizen of another State if that sale would not be legal in the purchaser's State of residence (Colorado).

The Ruger AR 556 with a 30 round magazine that Devin Kelley used in the assault and murder of the innocent could not be legally sold in Colorado. Since Kelley represented that he was a Colorado resident, the sale and delivery must comply with Colorado Law. Colorado law now and at the time of the sale to Kelley prohibits the sale of said assault rifle when the magazine is capable of holding more than 15 Rounds.

CAUSE OF ACTION NO.1- NEGLIGENCE

Plaintiffs incorporate each of the preceding paragraphs if fully restated herein in full.

At all material times to this suit, Defendant owed Plaintiffs a duty of reasonable care to ensure the safety, care and well-being of the public, including Plaintiffs, and had or assumed a duty to exercise reasonable care in executing such duties. Defendant failed to exercise reasonable care, and such failure was negligent and a proximate cause of the incident in question and resulting damages to Plaintiff.

These acts include, but are not limited to, the following:

a. Failing to protect the safety of the public, including the Plaintiffs;
b. Failing to follow policies and procedures in selling a firearm;
c. Failing to properly follow applicable law in the marketing and sale of firearms, and
d. Other ways to be determined during discovery in this matter.

Plaintiffs will show that one or all of the above-mentioned acts and/or omissions constitute negligence and are a proximate cause of the occurrence in question and the injuries and damages resulting to Plaintiff.

CAUSE OF ACTION No. 2-NEGLIGENCE HIRING, TRAINING, AND/OR SUPERVISION

Plaintiff's incorporate each of the preceding paragraphs as if fully restarted herein full.

At all material times to this suit, Defendant owed Plaintiff's a duty of reasonable care to ensure the safety, care and well-being of the public, including Plaintiffs. These duties include, but are not limited to, the hiring, retention, and supervision of trained employees to ensure that all legally required guidelines are fulfilled at the time of purchasing any firearm. Defendant breached these duties when its employee(s) sold a gun to Kelley in violation of the existing laws.

Despite actual or constructive knowledge of its employees to its patrons, Defendant failed to properly supervise and/or control Defendant's actions. Specifically, Defendant's following acts constituted negligence:

a. Entrusting Defendant's employees who lack adequate training and education concerning firearms and governing laws, with the administration and sale of firearms;
b. Failing to properly train employees regarding the appropriate methods, safety practices, and supervision for customers purchasing firearms;
c. Failing to properly supervise, monitor, and/or control employees tasked with selling firearms to the public;
d. Failing to continually monitor and/or screen their employees to ensure they are fit to sell firearms to the public, and
e. Failing to properly screen and perform investigative due diligence on prospective customers prior to selling them firearms.

CAUSE OF ACTION No.3- NEGLIGENT ENTRUSTMENT

Plaintiffs incorporate each of the preceding paragraphs as if fully restated herein in full.

At all material times to this suit, Defendant owed Plaintiffs a duty of reasonable care to ensure the safety, care and well-being of the public, including Plaintiffs. By selling the gun to Kelley without the proper oversight and by failing to follow policies, procedures, and applicable law in selling firearms pursuant to the laws, defendant supplied Kelley with a dangerous instrumentality that caused the deaths and injuries to Plaintiffs with that instrumentality.

CAUSE OF ACTION No. 4- GROSS NEGLIGENCE

Plaintiffs incorporate each of the preceding paragraphs as if fully restated herein in full.

The acts and/or omissions of the Defendant, as set forth herein, was also such knowing and willful failures to abide by the applicable safety guidelines regarding selling and purchasing firearms in the State of Texas, they constitute malicious, willful, wanton,

grossly, negligent and/or reckless conduct. Said acts and/or omissions proximately caused or contributed to Plaintiffs' injuries as such give rise to, and warrant, the imposition by a jury of significant punitive damages in an amount to the determined by that jury.

DAMAGES

Plaintiffs incorporate each of the preceding paragraphs as if fully restated herein in full.

Plaintiff, ROSANNE SOLIS seeks to recover from Defendant the following elements of damage regarding the injuries sustained by ROSANNE SOLIS:

a. Physical Pain and mental anguish sustained in the past;
b. Physical pain and mental anguish that, in reasonable probability Rosanne will sustain the future;
c. Disfigurement in the past;
d. Disfigurement that, in reasonable probability Rosanne Solis will sustain in the future;
e. Physical impairment sustained in the past;
f. Physical impairment that, in reasonable probability, Rosanne Solis will sustain in the future;
g. Medical care expenses incurred in the past;
h. Medical care expenses that, in reasonable probability, Rosanne Solis will incur in the future; and
i. Other reasonable consequential damages.

Plaintiff, JOAQUIN RAMIREZ seeks to recover from Defendant the following elements of damage regarding the injuries sustained by JOAQUIN RAMIREZ:

a. Physical Pain and mental anguish sustained in the past;
b. Physical pain and mental anguish that, in reasonable probability Joaquin will sustain the future;

c. Disfigurement in the past;

d. Disfigurement that, in reasonable probability Joaquin Ramirez will sustain in the future;

e. Physical impairment sustained in the past;

f. Physical impairment that, in reasonable probability, Joaquin Ramirez will sustain in the future;

g. Medical care expenses incurred in the past;

h. Medical care expenses that, in reasonable probability, Joaquin Ramirez will incur in the future; and

i. Other reasonable consequential damages.

Plaintiffs reserve the right to plead additional and more specific damages in the future as more facts become known. The above-mentioned elements of damages are those that Plaintiffs have suffered in the past up to the time of trial, but in addition, those that they, in reasonable probability, will continue to suffer in the future. As such, Plaintiffs under T.R.C.P.47 affirmatively plead that they seek monetary relief over $1,000,000.00 for Rosanne Solis and over $1,000,000.00 for Joaquin Ramirez, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees; and a demand for all the other relief to which the parties deem themselves entitled. All damages sought are within the jurisdictional limits of the Court.

CONDITIONS PRECEDENT

All conditions precedent has been performed or have occurred as required by Rule 54 of the Texas Rules of civil Procedure.

RULE 193.7 NOTICE

Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, Plaintiffs here by give actual notice to Defendant that any and all documents produced may be used against the Defendant producing the document at any pretrial proceeding and/or at the trial of this matter without the necessity of authenticating the documents.

REQUEST FOR DISCLOSURE

Pursuant to Rule 194 of the Texas Rules of civil Procedure, Defendant is requested to disclose the information and material describe din Rule 194.2 within Fifty (50) days of the service of this request.

JURY DEMAND

Plaintiffs demand a jury trial.

PRAYER

WHEREFORE PREMISES CONSIDERED, Plaintiffs pray as follows:

a. That Defendant be cited to appear in terms of the law;
b. That upon trial of this cause, Plaintiffs have and recover Judgments in an amount in excess of the minimum jurisdictional requirements of this Honorable Court against Defendant;
c. That Plaintiffs recover economic and non-economic damage;
d. That Plaintiffs recover costs of Court against the Defendant;
e. Court Costs;
f. That Plaintiffs recover pre-judgment and post-judgment interest at the legal rate per annum against Defendant; and, Plaintiffs further pray,
g. That Plaintiffs receive such other and further relief, both at law and in equity, to which Plaintiffs may show themselves to be justly entitled.

Respectfully submitted,

LeGRAND & BERNSTEIN

BY: _____

STANLEY BERNSTEIN
State Bar No. 02218900
sb@legrandandbernstein.com
GEORGE LEGRAND
State Bar No. 12171450
2511 North St. Mary's Street
San Antonio, Texas 78212
(210) 733-9439 Telephone
(210) 735-3542 Facsimile

ATTORNEYS FOR PLAINTIFF

Exhibit 03

cit PB

2018-CI-23302

408TH JUDICIAL DISTRICT COURT

ROBERT BRADEN VS ACADEMY LTD

DATE FILED: 12/11/2018

ROBERT BRADEN *Plaintiff*	§	**IN THE DISTRICT COURT OF**
VS.	§	**BEXAR COUNTY, TEXAS**
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS *Defendant*	§	**___ JUDICIAL DISTRICT**

PLAINTIFF'S ORIGINAL PETITION AND REQUEST FOR DISCLOSURE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Robert Braden, "Plaintiff" complaining of Academy, Ltd. d/b/a Academy Sports & Outdoors, hereinafter Defendant, and for cause of action would respectfully show the Court the following:

I.
DISCOVERY CONTROL PLAN

1. Plaintiff intends that discovery be conducted under Level 3 Rule 190 of The Texas Rules of Civil Procedure.

II.
THE PARTIES

2. Plaintiff, Robert Braden is an individual residing in Houston, Harris County, Texas.

3. Defendant, Academy, Ltd. d/b/a Academy Sports & Outdoors, is a domestic corporation headquartered and authorized to do business in Harris County, and may be served by serving its Registered Agent:

Academy, Ltd. d/b/a Academy Sports & Outdoors
c/o Genetha Turner.
1540 North Mason Road
Katy, Texas 77449

BY: /

2018 DEC 11 P 4:22

DEPUTY

FILED
DONNA KAY MCKINNEY
DISTRICT CLERK
BEXAR COUNTY, TEXAS

MR 144

III.
JURISDICTION AND VENUE

4. The Court has jurisdiction over the controversy because the damages are within the jurisdictional limits of the Court.

5. Furthermore, venue is proper m Bexar County, Texas under §15.002(a)(l) because all, or a substantial part of the events or omissions giving rise to the claims occurred, in Bexar County, Texas.

IV.
FACTS

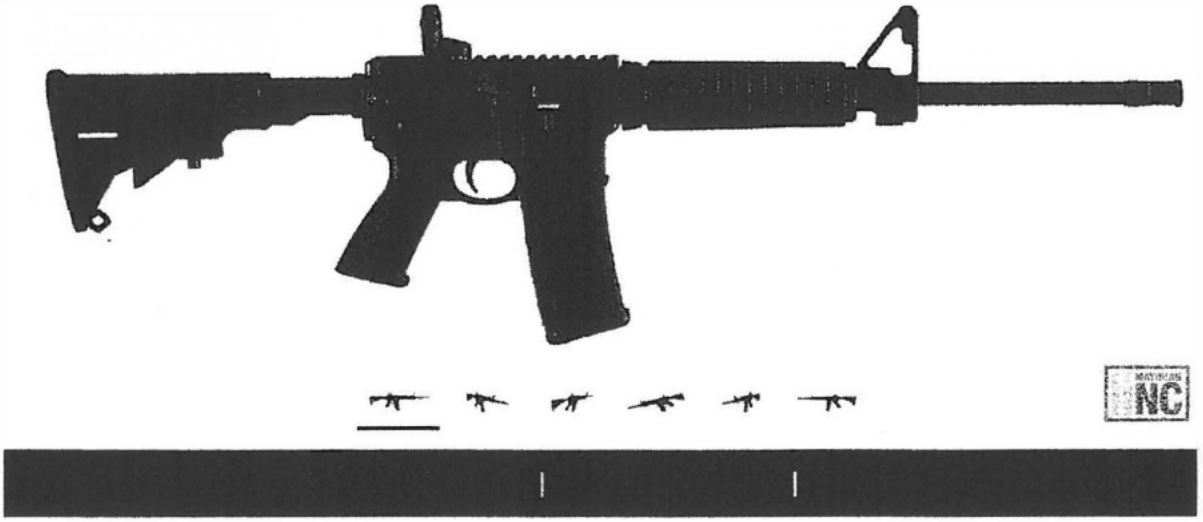
6. On November 5, 2017, Devin Patrick Kelley (hereinafter "Kelley") entered the First Baptist Church in Sutherland Springs, Texas clad in black tactical gear and ballistic vest, and wielding a Ruger AR-556 semi-automatic rifle with high capacity magazines. Kelley opened fire on the congregation, running up and down the pews as he sadistically shot people, taking the lives of 26 churchgoers and injuring 20 more.

7. Plaintiff Robert Braden was one of the members who was attending service at the First Baptist Church on the morning of November 5, 2017. Plaintiff was shot and sustained a head wound during Kelley's deadly rampage. Plaintiff witnessed multiple other friends and family member being shot.

8. Kelley's terrorist attack was the deadliest mass shooting by a single individual in Texas, the deadliest mass shooting in a place of worship in modern American history, and the fifth deadliest mass shooting in the United States.

9. In April 2016, Kelley purchased the Ruger AR-556 model 8500 semi-automatic rifle from Academy Sporting Goods in San Antonio, which he later used to perpetuate the attack on the membership of the First Baptist Church of Sutherland Springs.

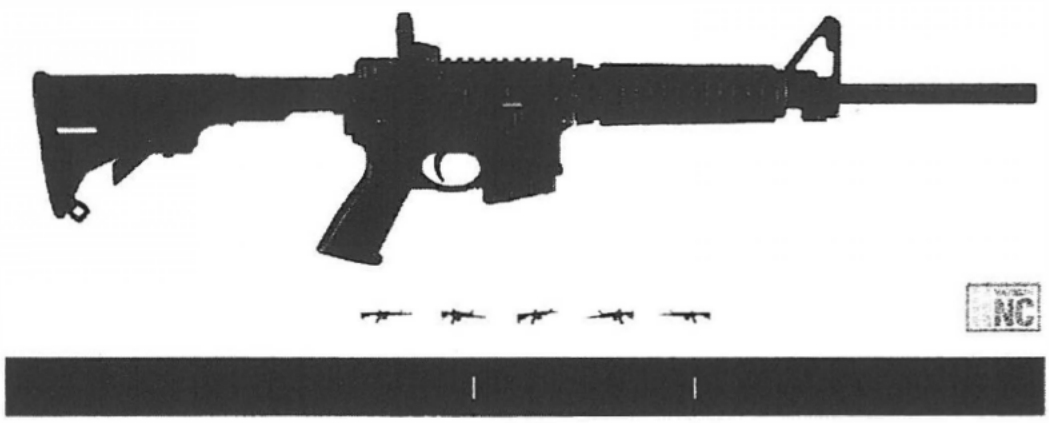
10. Ruger manufactures multiple models of the AR-556. One model is the 8500. It is a firearm designed to hold 30 rounds of ammunition and is legal to sell in Texas but not Colorado.



MODEL NUMBER: 8500 | CALIBER: 5.56 NATO

Stock	Black Synthetic, Collapsible	**Handguard**	Glass-Filled Nylon	**Overall Length**	32.25" - 35.50"
Front Sight	Adjustable Post	**Twist**	1:8" RH		
Rear Sight	Adjustable Ruger®	**Capacity**	30	**Length of Pull**	10.25" - 13.50"

Ruger also manufactures the model 8502. While very similar to the model 8500, this model firearm is legal to sell in both Colorado and Texas by virtue of the fact that it is designed to hold less than 15 rounds of ammunition.



MODEL NUMBER: 8502 | CALIBER: 5.56 NATO

Stock	Black Synthetic Fixed	**Handguard**	Glass-Filled Nylon	**Overall Length**	34.50"
Front Sight	Adjustable Post	**Twist**	1:8" RH	**Length of Pull**	13.50"
Rear Sight	Adjustable Ruger® Rapid Deploy	**Capacity**	10	**Grooves**	6

11. At the time Kelley illegally purchased the Ruger AR-556 model 8500 in Texas, he reported a Colorado Springs, Colorado address on his Firearms Transaction Record, Form 4473. He presented Defendant with a state-issued ID that reflected a matching state residence. This fact alone should have disqualified Kelley from ever purchasing the Ruger AR-556 model 8500 firearm which he was sold.

12. In the same transaction, Defendant also sold Kelley additional high capacity magazine designed to hold more than 15 rounds of ammunition. This is also illegal in Colorado.

13. No Colorado gun dealer could have legally sold the same equipment to Kelley under Colorado Law. As a self-proclaimed resident of Colorado, the firearm should never have been placed in Kelley's hands in Texas.

14. A Texas gun dealer (Academy) cannot sell a firearm and deliver that firearm to a citizen of another State if that sale would have not been legal in the purchaser's State of residence (Colorado).

15. The Ruger AR 556 model 8500 that Devin Kelley used in the Sutherland Springs massacre could not be legally sold in Colorado. Given that Devin Kelley represented that he was a Colorado resident, the sale and delivery must comply with Colorado Law. Colorado law, both now and at the time the rifle was sold to Kelley, prohibits the sale of a rifle capable of holding more than 15 rounds of ammunition. As such, selling a rifle model designed to hold more than 15 rounds to Devin Kelley, who identified himself to Academy as a Colorado resident, was illegal.

16. In the aftermath of the mass shootings currently plaguing our country, including but not limited to the shootings in a Church in Pittsburg, MGM Grand in Las Vegas, Pulse Nightclub in Orlando, Virginia Tech, Sandy Hook, and others, national sporting goods retailers including but not limited to Walmart, Dicks Sporting Goods, REI and Kroger have enacted logical limitations on the sale of the most predominant goods utilized by mass shooters, including Assault Rifles, High Capacity Magazines, and high-volume amounts of assault rifle ammunition, and follow the law in relation to firearm sales.

17. Academy enacted no such limitations on the sale of Assault Rifles, High Capacity Magazines or high-volume sales of assault rifle ammunition.

V.
NEGLIGENCE

18. Plaintiff incorporates each of the preceding paragraphs as if fully restated herein.

19. At all times material to this suit, Defendant owed Plaintiff a duty of reasonable care to ensure the safety, care, and well-being of the public, including Plaintiff, and had or assumed a duty to exercise reasonable care in executing such duties. Defendant failed to exercise reasonable care, and such failure was negligent and a proximate cause of the incident in question and resulting damages to Plaintiff. These acts include, but are not limited to, the following:

a. Failing to protect the safety of the public, including the Plaintiff;

b. Failing to follow policies and procedures for selling firearms;

c. Failing to follow industry standards for selling firearms;

d. Failing to properly follow applicable law in the marketing and sale of firearms;

e. Failing to conduct a proper background check; and

f. Other ways to be determined during discovery in this manner.

20. Plaintiff will show that one or all of the above-mentioned acts and/or omissions constitute negligence and gross negligence and were the proximate cause of the occurrence in question.

VI.
NEGLIGENT HIRING, TRAINING, AND SUPERVISION

21. Plaintiff incorporates each of the preceding paragraphs as if fully restated herein.

22. At all times material to this suit, Defendant owed Plaintiff a duty of reasonable care to ensure the safety, care, and well-being of the public, including the Plaintiff. These duties include, but are not limited to, the hiring, retention, and supervision of trained employees to ensure that all legally required guidelines are fulfilled at the time of selling of firearms and ammunition. Defendant breached these duties when its employee(s) sold a rifle to Kelley, in violation of existing laws.

23. Whether or not Defendant had actual or constructive knowledge of each of its employees' sale transactions with its patrons, Defendant failed to properly supervise and/or control its actions. Specifically, Defendant's following acts constitute negligence:

a. Entrusting Defendant's employees who lack adequate training and education concerning firearms and governing laws, with the administration and sale of firearms;

b. Failing to properly train employees regarding the appropriate methods, safety practices, and supervision for customers purchasing firearms;

c. Failing to properly supervise, monitor, and/or control employees tasked with selling firearms to the public;

e. Failing to properly screen and perform investigative due diligence on prospective customers prior to selling them firearms;

f. Failing to continually monitor and/or screen their employees to ensure they are fit to sell firearms to the public; and

g. Failing to appropriately discipline and/or reprimand its employee(s) after the shooting.

VII.
NEGLIGENT ENTRUSTMENT

24. Plaintiff incorporates each of the proceeding paragraphs as if fully restated herein.

25. At all times material to this suit, Defendant owed Plaintiff a duty of reasonable care to ensure the safety, care and well-being of the public, including the Plaintiff. By selling the rifle to Kelley without the proper oversight, and by failing to follow policies, procedures, industry standards and applicable laws with regards to the sale of a firearm, Defendant supplied Kelley with a weapon that was used to perpetuate the attack on Plaintiff and others at the First Baptist Church of Sutherland Springs, Texas.

VIII.
GROSS NEGLIGENCE

26. Plaintiff incorporates each of the preceding paragraphs as if fully restated herein.

27. The acts and/or omissions of the Defendant, as set forth herein, were also knowing and willful failures to abide by the applicable safety guidelines regarding the purchase and sale of firearms in the State of Texas. These actions constitute malicious, willful, wanton, grossly negligent and/or reckless conduct. Said acts and/or omissions proximately caused or contributed

to Plaintiff's injuries and as such, give rise to and warrant, the imposition by a jury of significant punitive damages in an amount to be determined by the jury.

IX.
DAMAGES

28. Plaintiff incorporates each of the preceding paragraphs as if fully restated herein.

29. As a direct and proximate result of the Defendant's aforementioned tortious conduct, Plaintiff sues in every capacity and for every element of damages to which they are entitled by reason of the matters made the basis of this suit. Plaintiff seeks to recover from Defendant the following damages:

a. Physical pain and mental anguish sustained in the past;

b. Physical pain and mental anguish that, in reasonable probability, will be sustained in the future;

c. Disfigurement in the past;

d. Disfigurement that, in reasonable probability, will be sustained in the future;

e. Physical impairment sustained in the past;

f. Physical impairment that, in reasonable probability, will be sustained in the future,

g. Medical care expenses incurred in the past;

h. Medical care expenses that, in reasonable probability, will be incurred in the future;

i. Future lost wages;

j. Future lost earning capacity;

k. Bystander Damages; and

l. Other reasonable consequential damages.

30. Plaintiff reserves the right to plead additional and more specific damages in the future as more facts become known. The above-mentioned elements of damages are those that

Plaintiff has suffered in the past up to the time of trial, but in addition, those that he, in reasonable probability, will continue to suffer in the future.

31. Plaintiff further seeks to recover punitive or exemplary damages, as those terms are understood in law, because of such gross negligence and the Defendant's conscious indifference to the rights, safety, and welfare of others.

32. As such, Plaintiff seeks all available damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees; and a demand for all the other relief to which the party is entitled.

X.
RULE 193.7 NOTICE

33. Pursuant to Rule 193 .7 of the Texas Rules of Civil Procedure, Plaintiff hereby gives actual notice to Defendant that any and all documents may be used against the Defendant producing the document at any pretrial proceeding and/or at the trial of this matter without the necessity of authenticating the documents.

XI.
REQUEST FOR DISCLOSURE

34. Pursuant to Rule 194 of the Texas Rules of Civil Procedure, Defendant is requested to disclose the information and material described in Rule 194.2.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff Robert Braden respectfully prays the Defendant be cited to answer herein, and that upon a final hearing of the cause, judgment be entered for the Plaintiff against Defendant for actual damages as alleged and exemplary damages, in an amount within the jurisdictional limits of this Court; together with pre-judgment interest (from the date of injury through the date of judgment) at the maximum rate allowed by law; post-

judgment interest at the legal rate, costs of court; and such other and further relief to which the Plaintiff may be entitled at law or in equity.

Respectfully submitted,

O'HANLON, DEMERATH & CASTILLO, PC

/s/ Justin B. Demerath
Justin B. Demerath
State Bar No. 24034415
808 West Ave.
Austin, Texas 78701
(512) 494-9949, telephone
(512) 494-9919, facsimile
jdemerath@808west.com
akeeran@808west.com
COUNSEL FOR PLAINTIFF

PLAINTIFF DEMANDS TRIAL BY JURY.

Exhibit 04

2018-CI-23259
285TH JUDICIAL DISTRICT COURT
CHANCIE MCMAHAN ET AL VS ACADEMY LTD
DATE FILED: 12/11/2018

cit PPS

CHANCIE MCMAHAN, INDIVIDUALLY AND AS NEXT FRIEND OF R.W., A MINOR; ROY WHITE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LULA WHITE; and SCOTT HOLCOMBE ***Plaintiffs*** **VS** **ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS** ***Defendant***	§ § § § § § § § § § § § § § §	**IN THE DISTRICT COURT** FILED DONNA KAY McKINNEY DISTRICT CLERK BEXAR COUNTY 2018 DEC 11 P 1:19 BY: DEPUTY _____ **JUDICIAL DISTRICT** **BEXAR COUNTY, TEXAS**

ORIGINAL PETITION AND REQUEST FOR DISCLOSURE

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Chancie McMahan, Individually and as Next Friend of R.W., a Minor; Roy White, Individually and as representative of the Estate of Lula White; and Scott Holcombe, "Plaintiffs" complaining of Academy, Ltd. D/B/A Academy Sports & Outdoors, hereinafter Defendant, and for cause of action would respectfully show the Court the following:

I.
DISCOVERY CONTROL PLAN

1. Plaintiffs intend that discovery be conducted under Level 3 Rule 190 of The Texas Rules of Civil Procedure.

II.
THE PARTIES

2. Plaintiff, Chancie McMahan, Individually and as Next Friend of R.W., a Minor, are individuals residing in San Saba, San Saba County, Texas.

MR 155

3. Plaintiff, Roy White, Individually and as Representative of the Estate of Lula White is an individual residing in Carrollton, Denton County, Texas.

4. Plaintiff, Scott Holcombe, is an individual residing in Floresville, Wilson County, Texas.

5. Defendant, Academy, Ltd. D/B/A Academy Sports & Outdoors, is a domestic corporation headquartered and authorized to do business in Harris County, Texas and may be served through its Agent for Service of Process, Genetha Turner, at 1540 North Mason Road, Katy, Texas 77449.

III.
JURISDICTION AND VENUE

6. The Court has jurisdiction over the controversy because the damages are within the jurisdictional limits of the Court.

7. Furthermore, venue is proper in Bexar County, Texas under §15.002(a)(1) because all, or a substantial part of the events or omissions giving rise to the claims occurred, in Bexar County, Texas.

IV.
FACTS

8. On November 5, 2017, Devin Patrick Kelley (hereinafter "Kelley") entered the First Baptist Church in Sutherland Springs, Texas clad in black tactical gear and ballistic vest, and wielding a Ruger AR-556 semi-automatic rifle. Kelley opened fire on the congregation, running up and down the pews as he sadistically shot people, taking the lives of 26 churchgoers and injuring 20 more.

9. Plaintiff Chancie McMahan's son, R.W., a minor, was one of the members who was attending service at the First Baptist Church on the morning of November 5, 2017. R.W. was shot five times and left severely wounded during Kelley's deadly rampage.

10. Plaintiff Roy White's mother, Lula White, was also one of the members attending service at the First Baptist Church on the morning of November 5, 2017. Lula White tragically lost her life as a result of Kelley's terrorist attack.

11. Plaintiff Scott Holcombe's parents, Bryan Holcombe and Karla Holcombe, were also attending service at the First Baptist Church on the morning of November 5, 2017. Bryan Holcombe and Karla Holcombe were also among those who tragically lost their lives during the attack on the First Baptist Church.

12. Kelley's terrorist attack was the deadliest mass shooting by a single individual in Texas, the deadliest mass shooting in a place of worship in modern American history, and the fifth deadliest mass shooting in the United States.

13. In April, 2016, Kelley purchased the Ruger AR-556 semi-automatic rifle from Academy Sporting Goods in San Antonio, which he later used to perpetuate the attack on the membership of the First Baptist Church of Sutherland Springs.

14. At the time Kelley purchased the Ruger AR-556 semi-automatic rifle, he reported a Colorado Springs, Colorado address on his Firearms Transaction Record, Form 4473, a federal form. This fact alone should have disqualified Kelley from ever purchasing the rifle. Kelley's identification indicated he was a resident of Colorado, not Texas. Thus, he never should have been sold the rifle he used in the First Baptist Church terrorist attack, and it was illegal for Kelley to transport that rifle to his Texas residence.

15. Specifically, no Colorado gun dealer could have sold the same rifle to Kelley under Colorado Law. The rifle should never have been placed in Kelley's hands in Texas.

16. A Texas gun dealer (Academy) cannot sell a firearm and deliver that firearm to a citizen of another State if that sale would have not be legal in the purchaser's State of residence (Colorado).

17. The Ruger AR 556 with a 30 round magazine that Devin Kelley used in the Sutherland Springs massacre could not be legally sold in Colorado and should never have been placed in Kelley's hands in Texas. Given that Devin Kelley represented that he was a Colorado resident, the sale and delivery must comply with Colorado Law. Under Colorado law, both now and at the rifle was sold to Kelley, prohibits the sale of a magazine capable of holding more than 15 rounds of ammunition. As such, selling a rifle with a magazine capable of holding more than 15 rounds to Devin Kelley, who identified himself to Academy as a Colorado resident, was illegal.

18. Finally, on November 7, 2012, while serving in the United States Air Force, Kelley plead guilty in a court-martial proceeding to charges of domestic violence, for acts committed against his wife and stepson. The allegations supporting this sentence included unlawfully striking, choking, kicking, and threatening his wife with a loaded firearm, and striking a child in the head and body with force likely to produce death or serious bodily harm.

19. Pursuant to the plea, numerous other charges were dismissed, including charges that, on more than one occasion, Kelley pointed firearms at his wife. Kelley was demoted, was issued a bad conduct discharge, and sentenced to twelve months of confinement in a military prison. As such, Kelley was prohibited by law from purchasing or possessing firearms and ammunition due to the military conviction for domestic violence on November 7, 2012.

V.
NEGLIGENCE

20. Plaintiffs incorporate each of the preceding paragraphs as if fully restated herein.

21. At all times material to this suit, Defendant owed Plaintiffs a duty of reasonable care to ensure the safety, care, and well-being of the public, including Plaintiffs, and had or assumed a duty to exercise reasonable care in executing such duties. Defendant failed to exercise reasonable care, and such failure was negligent and a proximate cause of the incident in question, and resulting damages to Plaintiffs. These acts include, but are not limited to, the following:

a. Failing to protect the safety of the public, including the Plaintiffs;

b. Failing to follow policies and procedures for selling firearms;

c. Failing to properly follow applicable law in the marketing and sale of firearms;

d. Failing to conduct a proper background check; and

e. Other ways to be determined during discovery in this manner.

22. Plaintiff will show that one or all of the above-mentioned acts and/or omissions constitute negligence and gross negligence and were the proximate cause of the occurrence in question.

VI.
NEGLIGENCE HIRING, TRAINING, AND SUPERVISION

23. Plaintiff incorporates each of the preceding paragraphs as if fully restated herein.

24. At all times material to this suit, Defendant owed Plaintiffs a duty of reasonable care to ensure the safety, care, and well-being of the public, including the Plaintiffs. These duties include, but are not limited to, the hiring, retention, and supervision of trained employees to ensure that all legally required guidelines are fulfilled at the time of selling a firearm. Defendant breached these duties when its employee(s) sold a rifle to Kelley, in violation of existing laws.

25. Despite actual or constructive knowledge of its employees to its patrons, Defendant failed to properly supervise and/or control its actions. Specifically, Defendant's following acts constitute negligence:

a. Entrusting Defendant's employees who lack adequate training and education concerning firearms and governing laws, with the administration and sale of firearms;

b. Failing to properly train employees regarding the appropriate methods, safety practices, and supervision for customers purchasing firearms;

c. Failing to properly supervise, monitor, and/or control employees tasked with selling firearms to the public;

d. Failing to properly screen and perform investigative due diligence on prospective customers prior to selling them firearms;

e. Failing to continual monitor and/or screen their employees to ensure they are fit to sell firearms to the public; and

f. Failing to appropriately discipline and/or reprimand its employee(s) after the shooting.

VII.
NEGLIGENT ENTRUSTMENT

26. Plaintiffs incorporate each of the proceeding paragraphs as if filly restated herein.

27. At all times material to this suit, Defendant owed Plaintiffs a duty of reasonable care to ensure the safety, care and well-being of the public, including the Plaintiffs. By selling the rifle to Kelley without the proper oversite, and by failing to follow policies, procedures, and applicable laws with regards to the sale of a firearm, Defendant supplied Kelley with a weapon that was used to perpetuate the attack on Plaintiffs and others at the First Baptist Church of Sutherland Springs, Texas.

VIII.
GROSS NEGLIGENCE

28. Plaintiff incorporates each of the preceding paragraphs as if fully restated herein.

29. The acts and/or omission of the Defendant, as set forth herein, were also knowing and willful failures to abide by the applicable safety guidelines regarding the purchase and sale of firearms in the State of Texas. These actions constitute malicious, willful, wanton, grossly negligent and/or reckless conduct. Said acts and/or omissions proximately caused or contributed to Plaintiffs' injuries as such give rise to, and warrant, the imposition by a jury of significant punitive damages in an amount to be determined by the jury.

IX.
DAMAGES
CHANCIE MCMAHAN, INDIVIDUALLY AND AS NEXT FRIEND OF R.W., A MINOR

30. Plaintiff Chancie McMahan, Individually and as Next Friend of R.W., a Minor incorporate each of the preceding paragraphs as if fully restated herein.

31. As a direct and proximate result of the Defendant's aforementioned tortious conduct, Plaintiff Chancie McMahan, Individually and as Next Friend of R.W., a Minor, sue in every capacity and for every element of damages to which they are entitled by reason of the matters made the basis of this suit. Plaintiff Chancie McMahan, Individually and as Next Friend of R.W. seek to recover from Defendant the following damages:

a. Physical pain and mental anguish R.W. sustained in the past;

b. Physical pain and mental anguish that, in reasonable probability, R.W. will sustain in the future;

c. Disfigurement in the past;

d. Disfigurement that, in reasonable probability, R.W. will sustain in the future;

e. Physical impairment sustained in the past;

f. Physical impairment that, in reasonable probability, R.W. will sustain in the future,

g. Medical care expenses incurred in the past;

h. Medical care expenses that, in reasonable probability, R.W. will incur in the future;

i. Future lost wages;

j. Future lost earning capacity;

k. Mental anguish suffered by Chancie McMahan in the past;

l. Mental anguish that, in all reasonable probability Chancie McMahan will sustain in the future;

m. Loss of Consortium; and

n. Other reasonable consequential damages.

32. Plaintiff Chancie McMahan, Individually and as Next Friend of R.W., a minor, reserve the right to plead additional and more specific damages in the future as more facts become known. The above-mentioned elements of damages are those that Plaintiffs have suffered in the past up to the time of trial, but in addition, those that they, in reasonable probability, will continue to suffer in the future.

33. Plaintiff Chancie McMahan, Individually and as Next of Friend of R.W., a Minor further seek to recover punitive or exemplary damages, as those terms are understood in law, because of such gross negligence and the Defendant's conscious indifference to the rights, safety, and welfare of others.

34. As such, Plaintiff Chancie McMahan, Individually and as Next Friend of R.W., a minor, seek monetary relief over $50,000,000.00, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees; and a demand for all the other relief to which the party is entitled.

X.
DAMAGES

ROY WHITE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LULA WHITE

35. Plaintiff Roy White, Individually and as Representative of the Estate of Lula White incorporate each of the preceding paragraphs as if fully restated herein.

36. As a direct and proximate result of Defendant's aforementioned tortious conduct, Plaintiff Roy White, Individually and as Representative of the Estate of Lula White, bring claims of wrongful death and survivorship pursuant to Chapter 71 of the Civil Practice and Remedies Code. Further, Plaintiff Roy White, Individually and as Representative of the Estate of Lula White, sue for all damages to which they are entitled under, including, but not limited to:

a. Pecuniary loss sustained in the past;

b. Pecuniary loss that, in reasonable probability, will be sustained in the future;

c. Loss of parental consortium in the past and future;

d. Loss of companionship and society sustained in the past;

e. Loss of companionship and society that, in reasonable probability, will be sustained in the future;

f. Mental anguish sustained in the past;

g. Mental anguish that, in reasonable probability, will be sustained in future; and

h. Funeral and Burial expenses.

37. Plaintiff Roy White, Individually and as Representative of the Estate of Lula White, reserve the right to plead additional and more specific damages in the future as more facts become known. The above-mentioned elements of damages are those that Plaintiffs have suffered in the past up to the time of trial, but in addition, those that they, in reasonable probability, will continue to suffer in the future.

38. Plaintiff Roy White, Individually and as Representative of the Estate of Lula White further seek to recover punitive or exemplary damages, as those terms are understood in law, because of such gross negligence and the Defendant's conscious indifference to the rights, safety, and welfare of others.

39. As such, Roy White, Individually and as Representative of the Estate of Lula White, seek monetary relief over $50,000,000.00, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees; and a demand for all the other relief to which the party is entitled.

XI.
DAMAGES
SCOTT HOLCOMBE

40. Plaintiff Scott Holcombe incorporates each of the preceding paragraphs as if fully restated herein.

41. As a direct and proximate result of Defendant's aforementioned tortious conduct, Plaintiff Scott Holcombe, bring claims of wrongful death and survivorship pursuant to Chapter 71 of the Civil Practice and Remedies Code. Further, Plaintiff Scott Holcombe sues for all damages to which he are entitled under, including, but not limited to:

a. Pecuniary loss sustained in the past;

b. Pecuniary loss that, in reasonable probability, will be sustained in the future;

c. Loss of parental consortium in the past and future;

d. Loss of companionship and society sustained in the past;

e. Loss of companionship and society that, in reasonable probability, will be sustained in the future;

f. Mental anguish sustained in the past;

g. Mental anguish that, in reasonable probability, will be sustained in future; and

h. Funeral and Burial expenses.

42. Plaintiff Scott Holcombe reserves the right to plead additional and more specific damages in the future as more facts become known. The above-mentioned elements of damages are those that Plaintiffs has suffered in the past up to the time of trial, but in addition, those that they, in reasonable probability, will continue to suffer in the future.

43. Plaintiff Scott Holcombe further seeks to recover punitive or exemplary damages, as those terms are understood in law, because of such gross negligence and the Defendant's conscious indifference to the rights, safety, and welfare of others.

44. As such, Scott Holcombe seek monetary relief over $50,000,000.00, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees; and a demand for all the other relief to which the party is entitled.

XII.
RULE 193.7 NOTICE

45. Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, Plaintiffs hereby give actual notice to Defendant that any and all documents may be used against the Defendant producing the document at any pretrial proceeding and/or at the trial of this matter without the necessity of authenticating the documents.

XIII.
REQUEST FOR DISCLOUSRE

46. Pursuant to Rule 194 of the Texas Rules of Civil Procedure, Defendant is requested to disclosure the information and material described in Rule 194.2 within **fifty (50) days** of the service of this request.

47. Plaintiffs demand a jury trial.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff, Chancie McMahan, Individually and as Next Friend of R.W., a Minor; Plaintiff Roy White, Individually and as Representative of the Estate of Lula White; and Plaintiff Scott Holcombe respectfully pray the Defendant be cited to appear and answer herein, and that upon a final hearing of the cause, judgment be entered for the Plaintiffs against Defendant for actual damages as alleged and exemplary damages, in an amount within the jurisdictional limits of this Court; together with pre-judgment interest (from the date of injury through the date of judgment) at the maximum rate allowed by law; post-judgment interest at the legal rate, costs of court; and such other and further relief to which the Plaintiffs may be entitled at law or in equity.

THE LAW OFFICES OF THOMAS J. HENRY & HILLIARD MARTINEZ GONZALES LLP

By: [redacted]

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Attorneys for Plaintiffs

Exhibit 05

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF F.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR;	§	**IN THE DISTRICT COURT**
Plaintiffs,	§	
v.	§	**BEXAR COUNTY, TEXAS**
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS	§	
Defendant.	§	**224TH JUDICIAL DISTRICT**

AFFIDAVIT OF [redacted]

Before me, the undersigned notary, personally appeared [redacted] who, after being duly sworn and identifying himself, upon oath stated the following:

1. "My name is [redacted] I am over the age eighteen, and I am competent to testify to all matters set forth herein and would so testify if called upon to do so. I have never been convicted of a felony. I am fully competent to make this affidavit. The facts stated herein are true and correct and are within my personal knowledge.

2. I am a Hardlines Manager for Academy, Ltd. d/b/a Academy Sports + Outdoors ("Academy") and was a Hardlines Manager for the Academy store located at 2024 N Loop 1604 East, San Antonio, Texas ("Academy Store 41") as of April 7, 2016. A Hardlines Manager at Academy is responsible for managing the sale of hardlines products that Academy carries, such as sporting equipment, fishing and camping equipment, as well as firearms. I am fully authorized to tender this Affidavit on behalf of Academy in the above-captioned case. I am familiar with our systems, and maintain Academy's business records referenced, considered, and reviewed in connection with this Affidavit. I acquired personal knowledge of the facts set forth in this Affidavit in my capacity as a Hardlines Manager for Academy and as a Hardlines Manager for Academy Store 41 as of April 7, 2016, and from my personal review of, and familiarity with, Academy's records and files concerning the sale at issue in this case

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3. The records attached hereto are kept by Academy in the regular course of business. It is in the regular course of business for an employee or representative of Academy, with knowledge of the act, event, condition, opinion, or diagnosis to make or to transmit information to be included in a record at or near the time of each act, event, condition, opinion or diagnosis set forth in the records.

4. On April 7, 2016, Devin Kelley visited Academy Store 41 seeking to purchase a Ruger AR-556.

5. Devin Kelley completed an ATF Form 4473 for the prospective sale of the Ruger AR-556. A true and correct copy of the completed ATF Form 4473 is attached to this affidavit as Exhibit A. The ATF Form 4473 does not reveal any disqualifying answers.

6. After the ATF Form 4473 was completed with no disqualifying answers, Academy performed a background check through the federal government's National Instant Criminal Background Check System ("NICS"). Devin Kelley passed the background check, and the NICS system instructed Academy to "Proceed" with the sale. A true and correct copy of the "Proceed" notification is attached to this affidavit as Exhibit B.

7. After receiving the "Proceed" notification from the NICS background check, Academy proceeded to sell the Ruger AR-556 to Devin Kelley. A true and correct copy of the transaction display for the sale of the Ruger AR-556 to Devin Kelley is attached to this affidavit as Exhibit C.

8. Academy Store 41 is a federal firearms dealer licensed under 18 U.S.C. § 921(a)(11). A true and correct copy of Academy Store 41's federal firearms license in effect at the time of the sale of the Ruger AR-556 to Devin Kelley is attached to this affidavit as Exhibit D.

FURTHER, AFFIANT SAYETH NOT."

[redacted]

SWORN TO AND SUBSCRIBED before me, the undersigned notary, by [redacted] on this 4th day of October, 2018.

MARK ANTHONY MEDELLIN, JR.
Notary Public, State of Texas
Comm. Expires 09-08-2019
NOTARY ID#: 13035991-2

Notary Public in and for
The State of Texas
My commission expires: 09-08-2019

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Exhibit A

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

OMB No. 1140-0020

Firearms Transaction Record Part I - Over-the-Counter

WARNING: You may not receive a firearm if prohibited by Federal or State law. The information you provide will be used to determine whether you are prohibited under law from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. §§ 921 *et seq.*, are punishable by up to 10 years imprisonment and/or up to a $250,000 fine.

Prepare in original only. All entries must be handwritten in ink. Read the Notices, Instructions, and Definitions on this form. "PLEASE PRINT."

Transferor's Transaction Serial Number *(If any)*

Section A - Must Be Completed Personally By Transferee (Buyer)

1. Transferee's Full Name

Last Name	First Name	Middle Name *(If no middle name, state "NMN")*
Kelley	Devin	Patrick

2. Current Residence Address **(U.S. Postal abbreviations are acceptable. Cannot be a post office box.)**

Number and Street Address	City	County	State	ZIP Code
[redacted]	Colorado Springs	El Paso	CO	80904

3. Place of Birth U.S. City and State	-OR- Foreign Country	4. Height Ft.	In.	5. Weight *(Lbs.)*	6. Gender	7. Birth Date Day	Year
San Marcos TX		5	10	235	☑ Male ☐ Female	[redacted]	

8. Social Security Number *(Optional, but will help prevent misidentification)*: [redacted]

9. Unique Personal Identification Number *(UPIN)* if applicable *(See Instructions for Question 9.)*

10.a. Ethnicity
- ☐ Hispanic or Latino
- ☑ Not Hispanic or Latino

10.b. Race *(Check one or more boxes.)*
- ☐ American Indian or Alaska Native
- ☐ Asian
- ☐ Black or African American
- ☐ Native Hawaiian or Other Pacific Islander
- ☑ White

11. Answer questions 11.a. *(see exceptions)* through 11.l. and 12 *(if applicable)* by checking or marking "yes" or "no" in the boxes to the right of the questions.

		Yes	No
a.	Are you the actual transferee/buyer of the firearm(s) listed on this form? **Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.** *(See Instructions for Question 11.a.) Exception: If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b.*	☑	☐
b.	Are you under indictment or information in any court for a **felony**, or any other crime, for which the judge could imprison you for more than one year? *(See Instructions for Question 11.b.)*	☐	☑
c.	Have you ever been convicted in any court of a **felony**, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? *(See Instructions for Question 11.c.)*	☐	☑
d.	Are you a fugitive from justice?	☐	☑
e.	Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?	☐	☑
f.	Have you ever been adjudicated **mentally defective** *(which includes a determination by a court, board, commission, or other lawful authority that you are a danger to yourself or to others or are incompetent to manage your own affairs)* **OR** have you ever been committed to a **mental institution**? *(See Instructions for Question 11.f.)*	☐	☑
g.	Have you been discharged from the Armed Forces under **dishonorable** conditions?	☐	☑
h.	Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? *(See Instructions for Question 11.h.)*	☐	☑
i.	Have you ever been convicted in any court of a misdemeanor crime of domestic violence? *(See Instructions for Question 11.i.)*	☐	☑
j.	Have you ever renounced your United States citizenship?	☐	☑
k.	Are you an alien **illegally** in the United States?	☐	☑
l.	Are you an alien admitted to the United States under a nonimmigrant visa? *(See Instructions for Question 11.l.) If you answered "no" to this question, do NOT respond to question 12 and proceed to question 13.*	☐	☑
12.	If you are an alien admitted to the United States under a nonimmigrant visa, do you fall within any of the exceptions set forth in the instructions? **(If "yes," the licensee must complete question 20c.)** *(See Instructions for Question 12.) If question 11.l. is answered with a "no" response, then do NOT respond to question 12 and proceed to question 13.*	☐	☑

13. What is your State of residence *(if any)*? *(See Instructions for Question 13.)*	14. What is your country of citizenship? *(List/check more than one, if applicable. If you are a citizen of the United States, proceed to question 16.)*	15. If you are not a citizen of the United States, what is your U.S.-issued alien number or admission number?
CO.	☑ United States of America ☐ Other *(Specify)*	

I certify that my answers to Section A are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. I understand that answering "yes" to question 11.a. if I am not the actual buyer is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I understand that a person who answers "yes" to any of the questions 11.b. through 11.k. is prohibited from purchasing or receiving a firearm. I understand that a person who answers "yes" to question 11.l. is prohibited from purchasing or receiving a firearm, unless the person also answers "Yes" to question 12. I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal firearms license is a violation of law ***(See Instructions for Question 16).***

16. Transferee's/Buyer's Signature	17. Certification Date
[signature]	4-7-16

Section B - Must Be Completed By Transferor (Seller)

18. Type of firearm(s) to be transferred *(check or mark all that apply)*:

☐ Handgun ☑ Long Gun *(rifles or shotguns)* ☐ Other Firearm *(Frame, Receiver, etc. See Instructions for Question 18.)*

19. If sale at a gun show or other qualifying event.

Name of Event _____

City, State _____

20a. Identification *(e.g., Virginia Driver's license (VA DL) or other valid government-issued photo identification.)* *(See Instructions for Question 20.a.)*

Issuing Authority and Type of Identification	Number on Identification	Expiration Date of Identification *(if any)* Month	Day	Year
CO. DL	[redacted]	2	12	2020

20b. Alternate Documentation *(If driver's license or other identification document does not show current residence address)* *(See Instructions for Question 20.b.)*

20c. Aliens Admitted to the United States Under a Nonimmigrant Visa Must Provide: Type of documentation showing an exception to the nonimmigrant visa prohibition. *(See Instructions for Question 20.c.)*

Questions 21, 22, or 23 Must Be Completed Prior To The Transfer Of The Firearm(s) *(See Instructions for Questions 21, 22 and 23.)*

21a. Date the transferee's identifying information in Section A was transmitted to NICS or the appropriate State agency: *(Month/Day/Year)*

Month	Day	Year
4	17	2016

21b. The NICS or State transaction number *(if provided)* was: 36RMN9Z

21c. The response initially provided by NICS or the appropriate State agency was:

☑ Proceed ☐ Delayed *[The firearm(s) may be transferred on _____ (Missing Disposition Information date provided by NICS) if State law permits (optional)]*

☐ Denied

☐ Cancelled

21d. If initial NICS or State response was *"Delayed,"* the following response was received from NICS or the appropriate State agency:

☐ Proceed _____ *(date)*

☐ Denied _____ *(date)*

☐ Cancelled _____ *(date)*

☐ No resolution was provided within 3 business days.

21e. *(Complete if applicable.)* After the firearm was transferred, the following response was received from NICS or the appropriate State agency on: _____ *(date).* ☐ Proceed ☐ Denied ☐ Cancelled

21f. The name and Brady identification number of the NICS examiner *(Optional)*

_____ *(name)* _____ *(number)*

22. ☐ No NICS check was required because the transfer involved only National Firearms Act firearm(s). *(See Instructions for Question 22.)*

23. ☐ No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS *(See Instructions for Question 23.)*

Issuing State and Permit Type	Date of Issuance *(if any)*	Expiration Date *(if any)*	Permit Number *(if any)*

Section C - Must Be Completed Personally By Transferee (Buyer)

If the transfer of the firearm(s) takes place on a different day from the date that the transferee *(buyer)* signed Section A, the transferee must complete Section C immediately prior to the transfer of the firearm(s). *(See Instructions for Question 24 and 25.)*

I certify that my answers to the questions in Section A of this form are still true, correct and complete.

24. Transferee's/Buyer's Signature	25. Recertification Date

Transferor (Seller) Continue to Next Page

STAPLE IF PAGES BECOME SEPARATED

ATF Form 4473 (5300.9) Part I
Revised April 2012

Section D - Must Be Completed By Transferor (Seller)

26. Manufacturer and/or Importer *(If the manufacturer and importer are different, the FFL should include both.)*	27. Model	28. Serial Number	29. Type *(pistol, revolver, rifle, shotgun, receiver, frame, etc.) (See instructions for question 29)*	30. Caliber or Gauge
RUGER	AR-556	852-06625	RIFLE	5.56 NATO

30a. Total Number of Firearms *(Please handwrite by printing e.g., one, two, three, etc. Do not use numerals.)* ONE

30b. Is any part of this transaction a Pawn Redemption? ☐ Yes ☒ No

30c. For Use by FFL *(See Instructions for Question 30c.)*

Complete ATF Form 3310.4 For Multiple Purchases of Handguns Within 5 Consecutive Business Days

31. Trade/corporate name and address of transferor *(seller) (Hand stamp may be used.)*

32. Federal Firearms License Number *(Must contain at least first three and last five digits of FFL Number X-XX-XXXXX.) (Hand stamp may be used.)*

FFL #5-74-09489

The Person Transferring The Firearm(s) Must Complete Questions 33-36. For Denied/Cancelled Transactions, The Person Who Completed Section B Must Complete Questions 33-35.

I certify that my answers in Sections B and D are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. On the basis of: (1) the statements in Section A (and Section C if the transfer does not occur on the day Section A was completed); (2) my verification of the identification noted in question 20a (and my reverification at the time of transfer *if the transfer does not occur on the day Section A was completed*); and (3) the information in the current State Laws and Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A.

33. Transferee's/Buyer's Name *(Type or print)*	34. Transferee's/Buyer's Signature	35. Transferor's/Seller's Title	36. Date Transferred
[redacted]	[redacted]	FFL	4-7-16

NOTICES, INSTRUCTIONS AND DEFINITIONS

Purpose of the Form: The information and certification on this form are designed so that a person licensed under 18 U.S.C. § 923 may determine if he or she may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the buyer of certain restrictions on the receipt and possession of firearms. This form should only be used for sales or transfers where the seller is licensed under 18 U.S.C. § 923. The seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction. Consequently, the seller must be familiar with the provisions of 18 U.S.C. §§ 921-931 and the regulations in 27 CFR Part 478. In determining the lawfulness of the sale or delivery of a long gun *(rifle or shotgun)* to a resident of another State, the seller is presumed to know the applicable State laws and published ordinances in both the seller's State and the buyer's State.

After the seller has completed the firearms transaction, he or she must make the completed, original ATF Form 4473 *(which includes the Notices, General Instructions, and Definitions)*, and any supporting documents, part of his or her permanent records. Such Forms 4473 must be retained for at least 20 years. Filing may be chronological *(by date)*, alphabetical *(by name)*, or numerical *(by transaction serial number)*, as long as all of the seller's completed Forms 4473 are filed in the same manner. FORMS 4473 FOR DENIED/CANCELLED TRANSFERS MUST BE RETAINED: If the transfer of a firearm is denied/cancelled by NICS, or if for any other reason the transfer is not complete after a NICS check is initiated, the licensee must retain the ATF Form 4473 in his or her records for at least 5 years. Forms 4473 with respect to which a sale, delivery, or transfer did not take place shall be separately retained in alphabetical *(by name)* or chronological *(by date of transferee's certification)* order.

If you or the buyer discover that an ATF Form 4473 is incomplete or improperly completed after the firearm has been transferred, and you or the buyer wish to make a record of your discovery, then photocopy the inaccurate form and make any necessary additions or revisions to the photocopy. You only should make changes to Sections B and D. The buyer should only make changes to Sections A and C. Whoever made the changes should initial and date the changes. The corrected photocopy should be attached to the original Form 4473 and retained as part of your permanent records.

Over-the-Counter Transaction: The sale or other disposition of a firearm by a seller to a buyer, at the seller's licensed premises. This includes the sale or other disposition of a rifle or shotgun to a nonresident buyer on such premises.

State Laws and Published Ordinances: The publication (ATF P 5300.5) of State firearms laws and local ordinances ATF distributes to licensees.

Exportation of Firearms: The State or Commerce Departments may require you to obtain a license prior to export.

Section A

Question 1. Transferee's Full Name: The buyer must personally complete Section A of this form and certify *(sign)* that the answers are true, correct, and complete. However, if the buyer is unable to read and/or write, the answers *(other than the signature)* may be completed by another person, excluding the seller. Two persons *(other than the seller)* must then sign as witnesses to the buyer's answers and signature.

When the buyer of a firearm is a corporation, company, association, partnership, or other such business entity, an officer authorized to act on behalf of the

Pa[redacted]) Part I

Exhibit B

FBI NICS E-Check - Confirmation Acknowledged

DEVIN KELLEY
NTN: 36RMN9Z
04/07/2016 17:59:44
The following response was confirmed with NICS:
PROCEED

Close
Print Page
Print Details

Exhibit C

TRANSACTION DISPLAY

ESCAPE™
EDJ Enterprises, Inc.

Date:	4/7/2016	Register:	202	Number:	3949
Store:	0041	Cashier:	348728	Total:	$822.12

Bracket: None

```
---------------------------------------
     348728 SALE         3949 0041 202
VERIFIED AGE 02
KELLEY               DEVIN
103530047*            MDS 1     699.99
SERIAL # 852-06623
23912389*             MDS 1      15.99
26078436*             MDS 1      40.99
19517101*             MDS 1       2.49
              SUBTOTAL           759.46
   8.25% SALES TAX                62.66
                TOTAL           822.12
   Cash                         840.00
              CHANGE             17.88
  Error in Request
  00124873900005902800118971100000000
                       4/07/16  17:15
```


MR 178

Exhibit D

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

Federal Firearms License
(18 U.S.C. Chapter 44)

In accordance with the provisions of Title I, Gun Control Act of 1968, and the regulations issued thereunder (27 CFR Part 478), you are licensed to engage in the business specified in this license, within the limitations of Chapter 44, Title 18, United States Code, and the regulations issued thereunder, until the expiration date shown. THIS LICENSE IS NOT TRANSFERABLE UNDER 27 CFR 478.51. See "WARNINGS" and "NOTICES" on reverse.

Direct ATF Correspondence To: ATF - Chief, FFLC 244 Needy Road Martinsburg, WV 25405-9431	License Number: **5-74-029-01-8C-00489**
Chief, Federal Firearms Licensing Center (FFLC) Tracy Robertson	Expiration Date: **March 1, 2018**

Name
ACADEMY SPORTS & OUTDOORS (#41)

Premises Address (Changes? Notify the FFLC at least 30 days before the move.)
2024 N LOOP 1604 EAST
SAN ANTONIO, TX 78232-

Type of License
01-DEALER IN FIREARMS OTHER THAN DESTRUCTIVE DEVICES

Purchasing Certification Statement

The licensee named above shall use a copy of this license to assist a transferor of firearms to verify the identity and the licensed status of the licensee as provided by 27 CFR Part 478. The signature on each copy must be an original signature. A faxed, scanned or e-mailed copy of the license with a signature intended to be an original signature is acceptable. The signature must be that of the Federal Firearms Licensee (FFL) or a responsible person of the FFL. I certify that this is a true copy of a license issued to the licensee named above to engage in the business specified above under "Type of License."

Licensee/Responsible Person Signature | Position Title

Printed Name | Date

Mailing Address (Changes? Notify the FFLC of any changes.)

ACADEMY, LTD.
ACADEMY SPORTS & OUTDOORS (#41)
1800 N MASON RD
KATY, TX 77449-

Previous Edition is Obsolete ACADEMY, LTD. 2024 N LOOP 1604 EAST 78232-74-029-01-8C-00489 March 1, 2018 01-DEALER IN FIREARMS OTHER THAN DESTRUCTIVE DEVICES

ATF Form 8 (5310.11)
Revised October 2011

Federal Firearms License (FFL) Customer Service Information

Federal Firearms Licensing Center (FFLC)
244 Needy Road
Martinsburg, WV 25405-9431

Toll-free Telephone Number: (866) 662-2750
Toll-free Fax Number: (866) 257-2749
E-mail: NLC@atf.gov

ATF Homepage: www.atf.gov
FFL eZ Check: www.atfonline.gov/fflezcheck

Change of Address *(27 CFR 478.52)*. Licensees may during the term of their current license remove their business or activity to a new location at which they intend regularly to carry on such business or activity by filing an Application for an Amended Federal Firearms License, ATF Form 5300.38, in duplicate, not less than 30 days prior to such removal with the Chief, Federal Firearms Licensing Center. The application must be executed under the penalties of perjury and penalties imposed by 18 U.S.C. 924. The application shall be accompanied by the licensee's original license. The license will be valid for the remainder of the term of the original license. **(The Chief, FFLC, shall, if the applicant is not qualified, refer the application for amended license to the Director of Industry Operations for denial in accordance with § 478.71.)**

Right of Succession *(27 CFR 478.56)*. (a) Certain persons other than the licensee may secure the right to carry on the same firearms or ammunition business at the same address shown on, and for the remainder of the term of, a current license. Such persons are: (1) The surviving spouse or child, or executor, administrator, or other legal representative of a deceased licensee; and (2) A receiver or trustee in bankruptcy, or an assignee for benefit of creditors. (b) In order to secure the right provided by this section, the person or persons continuing the business shall furnish the license for that business for endorsement of such succession to the Chief, FFLC, within 30 days from the date on which the successor begins to carry on the business.

(Continued on reverse side)

Cut Here

Federal Firearms License (FFL) Information Card

License Name: **ACADEMY, LTD.**

Business Name: **ACADEMY SPORTS & OUTDOORS (#41)**

License Number: **5-74-029-01-8C-00489**

License Type: **01-DEALER IN FIREARMS OTHER THAN DESTRUCTIVE DEVICES**

Expiration: **March 1, 2018**

Please Note: Not Valid for the Sale or Other Disposition of Firearms.

FFL Newsletter - Electronic Version Available

Sign-Up Today!

FFLs interested in receiving the electronic version of the FFL Newsletter, along with occasional additional information, should submit name, FFL number, and e-mail address to: FFLNewsletter@atf.gov.

The electronic FFL Newsletter will enable ATF to communicate information to licensees on a periodic basis.

WARNINGS

1. The license is NOT a permit to carry a concealed weapon. Under 27 CFR 478.58 (State or Other Law), a license issued under this part confers no right or privilege to conduct business or activity contrary to State or other law. The holder of such a license is not by reason of the rights and privileges granted by that license immune from punishment for operating a firearm or ammunition business or activity in violation of the provisions of any State or other law. Similarly, compliance with the provisions of any State or other law affords no immunity under Federal law or regulations.

2. **This license is not transferable under 27 CFR 478.51.**

3. As provided in 18 U.S.C. § 922(g), it is unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; who is a fugitive from justice; who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); who has been adjudicated as a mental defective or who has been committed to a mental institution; who, being an alien, is illegally or unlawfully in the United States or, except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26))); who has been discharged from the Armed Forces under dishonorable conditions; who, having been a citizen of the United States, has renounced his citizenship; who is subject to a court order that (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such a person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. Except as provided in 18 U.S.C. § 925, such persons are prohibited from engaging in the business otherwise authorized by this license.

4. **Alteration or Changes to the License. Alterations or changes in the original license or in duplications thereof violates 18 U.S.C. 1001, an offense punishable by imprisonment for not more than 5 years and/or a fine of not more than $250,000.**

NOTICES

1. Any change in trade name or control of this business MUST be reported within 30 days of the change to the Chief, Federal Firearms Licensing Center (FFLC), 244 Needy Road, Martinsburg, WV 25405-9431. (27 CFR 478.53-478.54). A licensee who reports a Change of Control must, upon expiration of the license, file an ATF Form 7 as required by 27 CFR 478.44.

2. Under § 478.45, Renewal of License, if a licensee intends to continue the business or activity described on a license issued under this part during any portion of the ensuing year, the licensee shall, unless otherwise notified in writing by the Chief, FFLC, execute and file with ATF prior to the expiration of the license an application for a license renewal, ATF Form 8 Part II, in accordance with the instructions on the form, and the required fee. In the event the licensee does not timely file an ATF Form 8 Part II, the licensee must file an ATF Form 7 as required by § 478.44, and obtain the required license before continuing business. A renewal application will automatically be mailed by ATF to the "mailing address" on the license approximately 60 days prior to the expiration date of the license. If the application is not received 30 days prior to the expiration date, the licensee should contact the FFLC.

3. This license is conditional upon compliance by you with the Clean Water Act (33 U.S.C. 1341(a)).

4. THIS LICENSE MUST BE POSTED AND KEPT AVAILABLE FOR INSPECTION (27 CFR 478.91).

ATF Form 8 (5310.11)
Revised October 2011

Federal Firearms License (FFL) Customer Service Information

(Continued from front)

Discontinuance of Business *(27 CFR 478.127)*. Where a licensed business is discontinued and succeeded by a new licensee, the records prescribed by this subpart shall appropriately reflect such facts and shall be delivered to the successor, or may be, within 30 days following business discontinuance, delivered to the ATF Out-of-Business Records Center, 244 Needy Road, Martinsburg, WV 25405, or to any ATF office in the division in which the business was located. Where discontinuance of the business is absolute, the records shall be delivered within 30 days following the business discontinuance to the ATF Out-of-Business Records Center, 244 Needy Road, Martinsburg, WV 25405, or to any ATF office in the division in which the business was located.

FBI NICS - National Instant Criminal Background Check System (NICS) Information. If you live in a State where the FBI will do any of the required firearms sale, delivery, or transfer checks, you must be enrolled to access the FBI's NICS Operation Center. For additional FFL enrollment information 1-877-324-NICS.

Cut Here

FFL eZ Check

Bureau of Alcohol, Tobacco, Firearms and Explosives
https://www.atfonline.gov/fflezcheck

The purpose of this program is to allow an FFL or other user to verify that a Federal Firearms License (FFL) is valid. FFL eZ Check does not validate Type 03 (Collectors of Curios and Relics) and Type 06 (Manufacturer of Ammunition) licenses.

Toll-Free Number: 1-877-560-2435

Federal Firearms Licensing Center (FFLC) 244 Needy Road Martinsburg, WV 25405-9431	Toll-free number: (866) 662-2750 Fax number: (866) 257-2749 E-mail: NLC@atf.gov

FFL eZ Check
https://www.atfonline.gov/fflezcheck

ATF Hotline Numbers

Arson Hotline: 1-888-ATF-FIRE (1-888 283-3473)
Bomb Hotline: 1-888-ATF BOMB (1-888 283-2662)
Report Illegal Firearms Activity: 1-800 ATF-GUNS (1-800-283-4867)
Firearms Theft Hotline: 1-888-930-9275
Report Stolen, Hijacked or Seized Cigarettes: 1-800-659-6242
Other Criminal Activity: 1-888-ATF-TIPS (1-888 283 8477)

Exhibit 06

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

OMB No. 1140-0020

Firearms Transaction Record Part I - Over-the-Counter

WARNING: You may not receive a firearm if prohibited by Federal or State law. The information you provide will be used to determine whether you are prohibited under law from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. §§ 921 *et. seq.*, are punishable by up to 10 years imprisonment and/or up to a $250,000 fine.

Prepare in original only. All entries must be handwritten in ink. Read the Notices, Instructions, and Definitions on this form. "PLEASE PRINT."

Transferor's Transaction Serial Number *(If any)*

Section A - Must Be Completed Personally By Transferee (Buyer)

1. Transferee's Full Name

Last Name	First Name	Middle Name *(If no middle name, state "NMN")*
Kelley	Devin	Patrick

2. Current Residence Address **(U.S. Postal abbreviations are acceptable. Cannot be a post office box.)**

Number and Street Address	City	County	State	ZIP Code
[redacted]	Colorado Springs	El Paso	CO	80904

3. Place of Birth U.S. City and State	-OR- Foreign Country	4. Height Ft.	In.	5. Weight *(Lbs.)*	6. Gender	7. Birth Date Month	Day	Year
San Marcos TX		5	10	235	☑ Male ☐ Female	[redacted]		

8. Social Security Number *(Optional, but will help prevent misidentification)*: [redacted]

9. Unique Personal Identification Number *(UPIN)* if applicable *(See Instructions for Question 9.)*

10.a. Ethnicity
- ☐ Hispanic or Latino
- ☑ Not Hispanic or Latino

10.b. Race *(Check one or more boxes.)*
- ☐ American Indian or Alaska Native
- ☐ Asian
- ☐ Black or African American
- ☐ Native Hawaiian or Other Pacific Islander
- ☑ White

11. Answer questions 11.a. *(see exceptions)* through 11.l. and 12 *(if applicable)* by checking or marking "yes" or "no" in the boxes to the right of the questions.

		Yes	No
a.	Are you the actual transferee/buyer of the firearm(s) listed on this form? **Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.** *(See Instructions for Question 11.a.) Exception: If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a. and may proceed to question 11.b.*	☑	☐
b.	Are you under indictment or information in any court for a **felony**, or any other crime, for which the judge could imprison you for more than one year? *(See Instructions for Question 11.b.)*	☐	☑
c.	Have you ever been convicted in any court of a **felony**, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? *(See Instructions for Question 11.c.)*	☐	☑
d.	Are you a fugitive from justice?	☐	☑
e.	Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?	☐	☑
f.	Have you ever been adjudicated **mentally defective** *(which includes a determination by a court, board, commission, or other lawful authority that you are a danger to yourself or to others or are incompetent to manage your own affairs)* **OR** have you ever been committed to a **mental institution**? *(See Instructions for Question 11.f.)*	☐	☑
g.	Have you been discharged from the Armed Forces under **dishonorable** conditions?	☐	☑
h.	Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? *(See Instructions for Question 11.h.)*	☐	☑
i.	Have you ever been convicted in any court of a misdemeanor crime of domestic violence? *(See Instructions for Question 11.i.)*	☐	☑
j.	Have you ever renounced your United States citizenship?	☐	☑
k.	Are you an alien **illegally** in the United States?	☐	☑
l.	Are you an alien admitted to the United States under a nonimmigrant visa? *(See Instructions for Question 11.l.) If you answered "no" to this question, do NOT respond to question 12 and proceed to question 13.*	☐	☑
12.	If you are an alien admitted to the United States under a nonimmigrant visa, do you fall within any of the exceptions set forth in the instructions? **(If "yes," the licensee must complete question 20c.)** *(See Instructions for Question 12.) If question 11.l. is answered with a "no" response, then do NOT respond to question 12 and proceed to question 13.*	☐	☑

13. What is your State of residence *(if any)*? *(See Instructions for Question 13.)*	14. What is your country of citizenship? *(List/check more than one, if applicable. If you are a citizen of the United States, proceed to question 16.)*	15. If you are not a citizen of the United States, what is your U.S.-issued alien number or admission number?
CO.	☑ United States of America ☐ Other *(Specify)*	

I certify that my answers to Section A are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. I understand that answering "yes" to question 11.a. if I am not the actual buyer is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I understand that a person who answers "yes" to any of the questions 11.b. through 11.k. is prohibited from purchasing or receiving a firearm. I understand that a person who answers "yes" to question 11.l. is prohibited from purchasing or receiving a firearm, unless the person also answers "Yes" to question 12. I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal firearms license is a violation of law ***(See Instructions for Question 16).***

16. Transferee's/Buyer's Signature	17. Certification Date
[signature]	4-7-16

Section B - Must Be Completed By Transferor (Seller)

18. Type of firearm(s) to be transferred *(check or mark all that apply)*:
☐ Handgun ☑ Long Gun *(rifles or shotguns)* ☐ Other Firearm *(Frame, Receiver, etc. See Instructions for Question 18.)*

19. If sale at a gun show or other qualifying event.
Name of Event _____
City, State _____

20a. Identification *(e.g., Virginia Driver's license (VA DL) or other valid government-issued photo identification.)* *(See Instructions for Question 20.a.)*

Issuing Authority and Type of Identification	Number on Identification	Expiration Date of Identification *(if any)* Month	Day	Year
CO. DL	[redacted]	2	12	2020

20b. Alternate Documentation *(If driver's license or other identification document does not show current residence address)* *(See Instructions for Question 20.b.)*

20c. Aliens Admitted to the United States Under a Nonimmigrant Visa Must Provide: Type of documentation showing an exception to the nonimmigrant visa prohibition. *(See Instructions for Question 20.c.)*

Questions 21, 22, or 23 Must Be Completed Prior To The Transfer Of The Firearm(s) *(See Instructions for Questions 21, 22 and 23.)*

21a. Date the transferee's identifying information in Section A was transmitted to NICS or the appropriate State agency: *(Month/Day/Year)*

Month	Day	Year
4	17	2016

21b. The NICS or State transaction number *(if provided)* was: 36RMN9Z

21c. The response initially provided by NICS or the appropriate State agency was:
☑ Proceed ☐ Delayed *[The firearm(s) may be transferred on _____ (Missing Disposition Information date provided by NICS) if State law permits (optional)]*
☐ Denied
☐ Cancelled

21d. If initial NICS or State response was *"Delayed,"* the following response was received from NICS or the appropriate State agency:
☐ Proceed _____ *(date)*
☐ Denied _____ *(date)*
☐ Cancelled _____ *(date)*
☐ No resolution was provided within 3 business days.

21e. *(Complete if applicable.)* After the firearm was transferred, the following response was received from NICS or the appropriate State agency on: _____ *(date).* ☐ Proceed ☐ Denied ☐ Cancelled

21f. The name and Brady identification number of the NICS examiner *(Optional)*
_____ *(name)* _____ *(number)*

22. ☐ No NICS check was required because the transfer involved only National Firearms Act firearm(s). *(See Instructions for Question 22.)*

23. ☐ No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS *(See Instructions for Question 23.)*

Issuing State and Permit Type	Date of Issuance *(if any)*	Expiration Date *(if any)*	Permit Number *(if any)*

Section C - Must Be Completed Personally By Transferee (Buyer)

If the transfer of the firearm(s) takes place on a different day from the date that the transferee *(buyer)* signed Section A, the transferee must complete Section C immediately prior to the transfer of the firearm(s). *(See Instructions for Question 24 and 25.)*

I certify that my answers to the questions in Section A of this form are still true, correct and complete.

24. Transferee's/Buyer's Signature	25. Recertification Date

Transferor (Seller) Continue to Next Page

STAPLE IF PAGES BECOME SEPARATED

ATF Form 4473 (5300.9) Part I
Revised April 2012

Section D - Must Be Completed By Transferor (Seller)

26. Manufacturer and/or Importer *(If the manufacturer and importer are different, the FFL should include both.)*	27. Model	28. Serial Number	29. Type *(pistol, revolver, rifle, shotgun, receiver, frame, etc.) (See instructions for question 29)*	30. Caliber or Gauge
RUGER	AR-556	852-06625	RIFLE	5.56 NATO

30a. Total Number of Firearms *(Please handwrite by printing e.g., one, two, three, etc. Do not use numerals.)* ONE

30b. Is any part of this transaction a Pawn Redemption? ☐ Yes ☒ No

30c. For Use by FFL *(See Instructions for Question 30c.)*

Complete ATF Form 3310.4 For Multiple Purchases of Handguns Within 5 Consecutive Business Days

31. Trade/corporate name and address of transferor *(seller) (Hand stamp may be used.)*

32. Federal Firearms License Number *(Must contain at least first three and last five digits of FFL Number X-XX-XXXXX.) (Hand stamp may be used.)*

FFL #5-74-09489

The Person Transferring The Firearm(s) Must Complete Questions 33-36. For Denied/Cancelled Transactions, The Person Who Completed Section B Must Complete Questions 33-35.

I certify that my answers in Sections B and D are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. On the basis of: (1) the statements in Section A (and Section C if the transfer does not occur on the day Section A was completed); (2) my verification of the identification noted in question 20a (and my reverification at the time of transfer *if the transfer does not occur on the day Section A was completed*); and (3) the information in the current State Laws and Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A.

33. Transferee's/Seller's Name *(Please print)*	34. Transferee's/Seller's Signature	35. Transferor's/Seller's Title	36. Date Transferred
[redacted]	[redacted]	FFL	4-7-16

NOTICES, INSTRUCTIONS AND DEFINITIONS

Purpose of the Form: The information and certification on this form are designed so that a person licensed under 18 U.S.C. § 923 may determine if he or she may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the buyer of certain restrictions on the receipt and possession of firearms. This form should only be used for sales or transfers where the seller is licensed under 18 U.S.C. § 923. The seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction. Consequently, the seller must be familiar with the provisions of 18 U.S.C. §§ 921-931 and the regulations in 27 CFR Part 478. In determining the lawfulness of the sale or delivery of a long gun *(rifle or shotgun)* to a resident of another State, the seller is presumed to know the applicable State laws and published ordinances in both the seller's State and the buyer's State.

After the seller has completed the firearms transaction, he or she must make the completed, original ATF Form 4473 *(which includes the Notices, General Instructions, and Definitions)*, and any supporting documents, part of his or her permanent records. Such Forms 4473 must be retained for at least 20 years. Filing may be chronological *(by date)*, alphabetical *(by name)*, or numerical *(by transaction serial number)*, as long as all of the seller's completed Forms 4473 are filed in the same manner. FORMS 4473 FOR DENIED/CANCELLED TRANSFERS MUST BE RETAINED: If the transfer of a firearm is denied/cancelled by NICS, or if for any other reason the transfer is not complete after a NICS check is initiated, the licensee must retain the ATF Form 4473 in his or her records for at least 5 years. Forms 4473 with respect to which a sale, delivery, or transfer did not take place shall be separately retained in alphabetical *(by name)* or chronological *(by date of transferee's certification)* order.

If you or the buyer discover that an ATF Form 4473 is incomplete or improperly completed after the firearm has been transferred, and you or the buyer wish to make a record of your discovery, then photocopy the inaccurate form and make any necessary additions or revisions to the photocopy. You only should make changes to Sections B and D. The buyer should only make changes to Sections A and C. Whoever made the changes should initial and date the changes. The corrected photocopy should be attached to the original Form 4473 and retained as part of your permanent records.

Over-the-Counter Transaction: The sale or other disposition of a firearm by a seller to a buyer, at the seller's licensed premises. This includes the sale or other disposition of a rifle or shotgun to a nonresident buyer on such premises.

State Laws and Published Ordinances: The publication (ATF P 5300.5) of State firearms laws and local ordinances ATF distributes to licensees.

Exportation of Firearms: The State or Commerce Departments may require you to obtain a license prior to export.

Section A

Question 1. Transferee's Full Name: The buyer must personally complete Section A of this form and certify *(sign)* that the answers are true, correct, and complete. However, if the buyer is unable to read and/or write, the answers *(other than the signature)* may be completed by another person, excluding the seller. Two persons *(other than the seller)* must then sign as witnesses to the buyer's answers and signature.

When the buyer of a firearm is a corporation, company, association, partnership, or other such business entity, an officer authorized to act on behalf of the

Exhibit 07

FBI NICS E-Check - Confirmation Acknowledged

DEVIN KELLEY
NTN: 36RMN9Z
04/07/2016 17:59:44
The following response was confirmed with NICS:
PROCEED

Close
Print Page
Print Details

Exhibit 08

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

Federal Firearms License
(18 U.S.C. Chapter 44)

In accordance with the provisions of Title I, Gun Control Act of 1968, and the regulations issued thereunder (27 CFR Part 478), you are licensed to engage in the business specified in this license, within the limitations of Chapter 44, Title 18, United States Code, and the regulations issued thereunder, until the expiration date shown. THIS LICENSE IS NOT TRANSFERABLE UNDER 27 CFR 478.51. See "WARNINGS" and "NOTICES" on reverse.

Direct ATF Correspondence To	ATF - Chief, FFLC 244 Needy Road Martinsburg, WV 25405-9431	License Number	**5-74-029-01-8C-00489**
Chief, Federal Firearms Licensing Center (FFLC)	Tracy Robertson	Expiration Date	**March 1, 2018**

Name
ACADEMY SPORTS & OUTDOORS (#41)

Premises Address (Changes? Notify the FFLC at least 30 days before the move.)
2024 N LOOP 1604 EAST
SAN ANTONIO, TX 78232-

Type of License
01-DEALER IN FIREARMS OTHER THAN DESTRUCTIVE DEVICES

Purchasing Certification Statement

The licensee named above shall use a copy of this license to assist a transferor of firearms to verify the identity and the licensed status of the licensee as provided by 27 CFR Part 478. The signature on each copy must be an original signature. A faxed, scanned or e-mailed copy of the license with a signature intended to be an original signature is acceptable. The signature must be that of the Federal Firearms Licensee (FFL) or a responsible person of the FFL. I certify that this is a true copy of a license issued to the licensee named above to engage in the business specified above under "Type of License."

Licensee/Responsible Person Signature | Position/Title

Printed Name | Date

Mailing Address (Changes? Notify the FFLC of any changes.)

ACADEMY, LTD.
ACADEMY SPORTS & OUTDOORS (#41)
1800 N MASON RD
KATY, TX 77449-

Previous Edition is Obsolete ACADEMY, LTD. 2024 N LOOP 1604 EAST 78232- 74-029-01-8C-00489 March 1, 2018 01-DEALER IN FIREARMS OTHER THAN DESTRUCTIVE DEVICES

ATF Form 8 (5310.11)
Revised October 2011

Federal Firearms License (FFL) Customer Service Information

Federal Firearms Licensing Center (FFLC)
244 Needy Road
Martinsburg, WV 25405-9431

Toll-free Telephone Number: (866) 662-2750
Toll-free Fax Number: (866) 257-2749
E-mail: NLC@atf.gov

ATF Homepage: www.atf.gov
FFL eZ Check: www.atfonline.gov/fflezcheck

Change of Address *(27 CFR 478.52)*. Licensees may during the term of their current license remove their business or activity to a new location at which they intend regularly to carry on such business or activity by filing an Application for an Amended Federal Firearms License, ATF Form 5300.38, in duplicate, not less than 30 days prior to such removal with the Chief, Federal Firearms Licensing Center. The application must be executed under the penalties of perjury and penalties imposed by 18 U.S.C. 924. The application shall be accompanied by the licensee's original license. The license will be valid for the remainder of the term of the original license. **(The Chief, FFLC, shall, if the applicant is not qualified, refer the application for amended license to the Director of Industry Operations for denial in accordance with § 478.71.)**

Right of Succession *(27 CFR 478.56)*. (a) Certain persons other than the licensee may secure the right to carry on the same firearms or ammunition business at the same address shown on, and for the remainder of the term of, a current license. Such persons are: (1) The surviving spouse or child, or executor, administrator, or other legal representative of a deceased licensee; and (2) A receiver or trustee in bankruptcy, or an assignee for benefit of creditors. (b) In order to secure the right provided by this section, the person or persons continuing the business shall furnish the license for that business for endorsement of such succession to the Chief, FFLC, within 30 days from the date on which the successor begins to carry on the business.

(Continued on reverse side)

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Federal Firearms License (FFL) Information Card

License Name: **ACADEMY, LTD.**
Business Name: **ACADEMY SPORTS & OUTDOORS (#41)**
License Number: **5-74-029-01-8C-00489**
License Type: **01-DEALER IN FIREARMS OTHER THAN DESTRUCTIVE DEVICES**
Expiration: **March 1, 2018**

Please Note: Not Valid for the Sale or Other Disposition of Firearms.

FFL Newsletter - Electronic Version Available

Sign-Up Today!

FFLs interested in receiving the electronic version of the FFL Newsletter, along with occasional additional information, should submit name, FFL number, and e-mail address to: FFLNewsletter@atf.gov.

The electronic FFL Newsletter will enable ATF to communicate information to licensees on a periodic basis.

WARNINGS

1. The license is NOT a permit to carry a concealed weapon. Under 27 CFR 478.58 (State or Other Law), a license issued under this part confers no right or privilege to conduct business or activity contrary to State or other law. The holder of such a license is not by reason of the rights and privileges granted by that license immune from punishment for operating a firearm or ammunition business or activity in violation of the provisions of any State or other law. Similarly, compliance with the provisions of any State or other law affords no immunity under Federal law or regulations.

2. **This license is not transferable under 27 CFR 478.51.**

3. As provided in 18 U.S.C. § 922(g), it is unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; who is a fugitive from justice; who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); who has been adjudicated as a mental defective or who has been committed to a mental institution; who, being an alien, is illegally or unlawfully in the United States or, except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26))); who has been discharged from the Armed Forces under dishonorable conditions; who, having been a citizen of the United States, has renounced his citizenship; who is subject to a court order that (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such a person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. Except as provided in 18 U.S.C. § 925, such persons are prohibited from engaging in the business otherwise authorized by this license.

4. **Alteration or Changes to the License. Alterations or changes in the original license or in duplications thereof violates 18 U.S.C. 1001, an offense punishable by imprisonment for not more than 5 years and/or a fine of not more than $250,000.**

NOTICES

1. Any change in trade name or control of this business MUST be reported within 30 days of the change to the Chief, Federal Firearms Licensing Center (FFLC), 244 Needy Road, Martinsburg, WV 25405-9431. (27 CFR 478.53-478.54). A licensee who reports a Change of Control must, upon expiration of the license, file an ATF Form 7 as required by 27 CFR 478.44.

2. Under § 478.45, Renewal of License, if a licensee intends to continue the business or activity described on a license issued under this part during any portion of the ensuing year, the licensee shall, unless otherwise notified in writing by the Chief, FFLC, execute and file with ATF prior to the expiration of the license an application for a license renewal, ATF Form 8 Part II, in accordance with the instructions on the form, and the required fee. In the event the licensee does not timely file an ATF Form 8 Part II, the licensee must file an ATF Form 7 as required by § 478.44, and obtain the required license before continuing business. A renewal application will automatically be mailed by ATF to the "mailing address" on the license approximately 60 days prior to the expiration date of the license. If the application is not received 30 days prior to the expiration date, the licensee should contact the FFLC.

3. This license is conditional upon compliance by you with the Clean Water Act (33 U.S.C. 1341(a)).

4. THIS LICENSE MUST BE POSTED AND KEPT AVAILABLE FOR INSPECTION (27 CFR 478.91).

ATF Form 8 (5310.11)
Revised October 2011

Federal Firearms License (FFL) Customer Service Information

(Continued from front)

Discontinuance of Business *(27 CFR 478.127)*. Where a licensed business is discontinued and succeeded by a new licensee, the records prescribed by this subpart shall appropriately reflect such facts and shall be delivered to the successor, or may be, within 30 days following business discontinuance, delivered to the ATF Out-of-Business Records Center, 244 Needy Road, Martinsburg, WV 25405, or to any ATF office in the division in which the business was located. Where discontinuance of the business is absolute, the records shall be delivered within 30 days following the business discontinuance to the ATF Out-of-Business Records Center, 244 Needy Road, Martinsburg, WV 25405, or to any ATF office in the division in which the business was located.

FBI NICS - National Instant Criminal Background Check System (NICS) Information. If you live in a State where the FBI will do any of the required firearms sale, delivery, or transfer checks, you must be enrolled to access the FBI's NICS Operation Center. For additional FFL enrollment information 1-877-324-NICS.

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FFL eZ Check

Bureau of Alcohol, Tobacco, Firearms and Explosives
https://www.atfonline.gov/fflezcheck

The purpose of this program is to allow an FFL or other user to verify that a Federal Firearms License (FFL) is valid. FFL eZ Check does not validate Type 03 (Collectors of Curios and Relics) and Type 06 (Manufacturer of Ammunition) licenses.

Toll-Free Number: 1-877-560-2435

Federal Firearms Licensing Center (FFLC) 244 Needy Road Martinsburg, WV 25405-9431	Toll-free number: (866) 662-2750 Fax number: (866) 257-2749 E-mail: NLC@atf.gov

FFL eZ Check
https://www.atfonline.gov/fflezcheck

ATF Hotline Numbers

Arson Hotline: 1-888-ATF-FIRE (1-888 283-3473)
Bomb Hotline: 1-888-ATF BOMB (1-888 283-2662)
Report Illegal Firearms Activity: 1-800 ATF-GUNS (1-800-283-4867)
Firearms Theft Hotline: 1-888-930-9275
Report Stolen, Hijacked or Seized Cigarettes: 1-800-659-6242
Other Criminal Activity: 1-888-ATF-TIPS (1-888 283 8477)

Exhibit 09

TRANSACTION DISPLAY

ESCAPE™
EDJ Enterprises, Inc.

Date:	4/7/2016	**Register:**	202	**Number:**	3949
Store:	0041	**Cashier:**	348728	**Total:**	$822.12

Bracket: None

```
---------------------------------------
     348728 SALE         3949 0041 202
VERIFIED AGE 02
KELLEY                DEVIN
103530047*             MDS 1     699.99
SERIAL # 852-06623
23912389*              MDS 1      15.99
26078436*              MDS 1      40.99
19517101*              MDS 1       2.49
              SUBTOTAL            759.46
   8.25% SALES TAX                 62.66
                TOTAL              822.12
   Cash                            840.00
              CHANGE                17.88
  Error in Request
  00124873900005902800118971100000000
                       4/07/16  17:15
```


MR 192

TAB G

***CONTAINS SENSITIVE DATA**

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR AND AS NEXT FRIEND OF F.W., A MINOR, ROBERT LOOKINGBILL AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVE OF THE ESTATE OF E.G., DECEASED MINOR	§	**IN THE DISTRICT COURT**
Plaintiffs	§	
	§	**224TH JUDICIAL DISTRICT**
VS	§	
	§	**BEXAR COUNTY, TEXAS**
ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS	§	
Defendant	§	

COMBINED FOR PRETRIAL MATTERS WITH
CAUSE NO. 2018CI14368

ROSANNE SOLIS AND JOAQUIN RAMIREZ	§	**IN THE DISTRICT COURT**
Plaintiffs	§	
	§	**438th JUDICIAL DISTRICT**
VS	§	
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS	§	
Defendant	§	**BEXAR COUNTY, TEXAS**

CAUSE NO. 2018CI23302

ROBERT BRADEN	§	**IN THE DISTRICT COURT**
Plaintiff	§	
	§	
VS	§	**408th JUDICIAL DISTRICT**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS	§	
	§	
Defendant	§	
	§	**BEXAR COUNTY, TEXAS**

CAUSE NO. 2018CI23299

CHANCIE MCMAHAN, INDIVIDUALLY AND AS NEXT FRIEND OF R.W., A MINOR; ROY WHITE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LULA WHITE; and SCOTT HOLCOMBE	§	**IN THE DISTRICT COURT**
	§	
Plaintiffs	§	
	§	
VS	§	**258TH JUDICIAL DISTRICT**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS	§	
	§	
Defendant	§	
	§	**BEXAR COUNTY, TEXAS**

PLAINTIFFS' RESPONSE TO DEFENDANT'S SECOND AMENDED MOTION FOR TRADITIONAL SUMMARY JUDGMENT

Table of Contents

Table of Authorities

COME NOW, Chris Ward, individually and as Representative of the Estates of Joann Ward, deceased, and B.W., a deceased minor, and as next friend of R.W., a minor; Robert and Dalia Lookingbill, individually and as next friend of R.G., a minor, and as Representative of the Estate of E.G, a deceased minor, Rosanne Solis, Joaquin Ramirez, Chancie McMahan, individually and as next friend of R.W., a minor, Roy White, individually and as Representative of the Estate of Lula White; Scott Holcombe, and Robert Braden (collectively referred to as "Plaintiffs") and file this Response to Defendant Academy, Ltd. d/b/a Academy Sports + Outdoors's ("Defendant" or "Academy") Second Amended Traditional Motion for Summary Judgment ("Def. Mtn."), and in support of the same, would respectfully show the Court as follows:

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Academy illegally and negligently sold Devin Patrick Kelley the Model 8500 Ruger AR-556 semi-automatic, AR-15 style assault rifle (the "Ruger") he used to commit a mass assault in a Sutherland Springs church that killed 26 people and injured 20 more—including these Plaintiffs. Had Academy obeyed the law, Kelley would never have received the weapon and these innocent lives would not have been lost. Texas common law (like the law of most states) affords Plaintiffs a right to seek redress from Academy for its wrongful, dangerous, and unlawful conduct.

Academy claims that Congress, through the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. §§ 7901, *et. seq.*, prohibits Texas from applying Texas common law against Academy, and requires this Court to dismiss the case before discovery is even completed. Academy is wrong. The Protection of *Lawful* Commerce in Arms Act provides *no protection* to gun dealers who engage in *unlawful* commerce, as Academy did here. PLCAA only prohibits "qualified civil liability action[s]"—which expressly do not include cases in which a defendant knowingly violates a law applicable to the sale or marketing of firearms. 15 U.S.C. §

7903(5)(a)(iii). Courts across the country agree that if a case comes within this so-called "predicate" exception because of unlawful conduct by a firearms dealer, PLCAA does not bar any of a plaintiff's claims. *See, e.g., Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 151 (N.Y. App. Div. 2012), *amended by* 103 A.D.3d 1191 (N.Y. App. Div. 2013); and *infra at* 9.

This case falls within the "predicate exception" because Academy knowingly violated 18 U.S.C. § 922(b)(3), and this violation proximately caused all of Plaintiffs' harms. Kelley provided Academy with identification listing a Colorado residence, so 18 U.S.C. § 922(b)(3) required that Academy's sale of the Ruger to Kelley "fully comply with the legal conditions of sale" of *both* Texas and Colorado. S*ee* [redacted] Depo. at 108:1-109:25, attached as Exhibit 1. Academy's sale of the Ruger to Kelley violated the "legal conditions of sale" imposed by federal law because federal law incorporates Colorado's prohibition on the sale or possession of large capacity ammunition magazines ("LCMs") that hold over 15 rounds (Col. Rev. Stat. §§18-12-301, 302) as applied to the Ruger sale, and a "component part" of the Ruger and an integral part of the Ruger transaction was a 30-round LCM. .

Academy admits that federal law prohibits it from selling a long gun to a Colorado resident at its Texas store if the gun has a "component part" that is prohibited in Colorado. *See* [redacted] Depo. at 59:5-12, attached as Exhibit 2. And federal law recognizes that a magazine that comes in the box—like the LCM at issue here—is a "component part" of the firearm. 27 C.F.R. § 53.61(b)(5). For this reason, Academy and Sturm Ruger (the manufacturer) recognize that this model of the Ruger firearm, with its 30-round magazine, cannot be sold in or shipped to Colorado. *See* Ex. 1, [redacted] Depo. at 189:12-19, 190:1-7. That is because under federal law it cannot be sold to Colorado residents.

The evidence also shows that the magazine was an inseparable part of the unit transferred in this firearms sale: it came in the Ruger box; the price and stock keeping unit (or "SKU") number assigned by Academy included the magazine; and Academy employees are precluded from separating firearms from magazines included by the manufacturer. *See infra* at 15-17. The illegal magazine was as much an integral part of the firearm's sale as the tires are part of a sale of a new truck.

Nevertheless, even if this case did not satisfy the "predicate exception," this case is not a "qualified civil liability action" that is barred by PLCAA. This is because Plaintiffs' damages were not "solely caused" by Kelley's criminal actions; instead, Academy's own negligence and misconduct directly caused Plaintiffs' damages. Applying Supreme Court precedent regarding principles of federalism, PLCAA provides no immunity where a Defendant's own misconduct caused Plaintiffs' harm. Further, PLCAA and Texas law permit Plaintiffs' negligent entrustment claim even if other claims are barred.

Academy virtually ignores all relevant, persuasive authority construing PLCAA and 18 U.S.C. § 922(b)(3). Defendant has not come close to meeting its burden under Tex. R. Civ. P. 166 and is not entitled to judgment as a matter of law. Summary judgment should therefore be denied.

SUMMARY JUDGMENT EVIDENCE

To support the facts in this Response, Plaintiffs offer the following summary judgment evidence attached to this Response and incorporate the evidence into this Response by reference.

Exhibit 1: November 9, 2018, Deposition of [redacted] ("[redacted] Depo.")

Exhibit 2: November 13, 2018, Deposition of [redacted] ("[redacted] Depo.")

Exhibit 3: Academy's Website Listing the Ruger AR-556 5.56 Semiautomatic Rifle, Available at https://www.academy.com/shop/pdp/ruger-ar-556-556-semiautomatic-rifle#repChildCatid=1364736 (last accessed Jan. 23, 2019)

Exhibit 4: November 7, 2018, Deposition of [redacted] ("[redacted] Depo.")

Exhibit 5: Affidavit of Joseph Vince ("Vince Aff.")

Exhibit 6: *Corporan v. Wal-Mart Stores East, LP*, 2016 U.S. Dist. LEXIS 93307, *6-*11 (D. Kan. 2016)

Exhibit 7: *Englund v. World Pawn*, No. 16-CV-00598, Letter Order at 5 (Ore. Cir. Ct. 2018)

Exhibit 8: ATF Form 4473 selling the Ruger to Devin Kelley on (April, 7, 2016)

Exhibit 9: Academy Documents Bates-Stamped: 00059 and 000132

Exhibit 10: November 13, 2018, Deposition of [redacted] ("[redacted] Depo.")

Exhibit 11: Academy Documents Bates-Stamped: 002308 and 002309

Exhibit 12: *Gladden v. Bangs*, 2012 U.S. Dist. LEXIS 23304, *3 (E.D. Va. 2012)

Exhibit 13: *Barany v. Van Haelst*, 2010 U.S. Dist. LEXIS 128290, *6, *18-21 (E.D. Wash. 2010)

Exhibit 14: S. 1805, 109th Cong. PLCAA bill

Exhibit 15: S. 397, 109th Cong. PLCAA bill

Exhibit 16: 151 Cong. Rec. S9061, S9099 (daily ed. July 27, 2005)

Exhibit 17: 151 Cong. Rec. S9077 (daily ed. July 27, 2005)

Exhibit 18: 151 Cong. Rec. S9107 (daily ed. July 27, 2005)

Exhibit 19: 151 Cong. Rec. S9389 (daily ed. July 29, 2005)

Exhibit 20: *City of Gary v. Smith & Wesson Corp.*, No. 45D05-005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006)

RELEVANT FACTUAL BACKGROUND

On April 7, 2016, Academy sold Devin Patrick Kelley the Ruger in one of its Texas stores; a 30-round magazine was included as a "component part" of this weapon and was an inseparable part of the transaction involving the sale of a "firearm." *See* Ex. 1, [redacted] Depo., 18:15-21, 44:17,

49:7-8; 27 § C.F.R. 53.61(b)(5)(ii). Academy concedes the Ruger can function as advertised and intended—as a semiautomatic rifle—if and only if a magazine is attached. *See* https://www.academy.com/shop/pdp/ruger-ar-556-556-semiautomatic-rifle#repChildCatid=1364736, attached as Exhibit 3; Ex. 1, [redacted] Depo. at 27:2-11, 27:24-28:2; [redacted] Depo. at 11:16-19, attached as Exhibit 4 ("Q. So in order to shoot it in a semiautomatic fashion, it has to have the magazine, correct? A. The magazine would have to be attached to the Ruger AR-556."); *see also* Affidavit of Joseph Vince ("Vince Aff.") at 4(i), attached as Exhibit 5.

Academy's own website emphasizes that the Ruger inherently "includes" a 30-round magazine as an integral component of the weapon. *See* Ex.1, [redacted] Depo. at 198:7-19 ("The Ruger AR-556 5.56 semiautomatic rifle is a semiautomatic rifle with a 30-round capacity… *Includes a 30-round Magpul magazine."*) (emphasis added). Sturm Ruger packages the 30-round magazine inside the box with the weapon (*See* Ex. 1, [redacted] Depo at 104:14-15) and Academy never sells a firearm without the magazine included in the box by the manufacturer. *See* Ex. 4, [redacted] Depo. at 118:1-6. Academy actually prohibits its employees from removing such magazines from the box. *See* Ex. 1, [redacted] Depo. at 42:20-43:2.

At the time of Academy's sale of the Ruger, Kelley provided Academy with a Colorado driver's license showing him as residing in Colorado and listed himself as a Colorado resident on the Bureau of Alcohol, Tobacco Firearms and Explosives ("ATF") Firearms Transaction Record form ("Form 4473"), which is legally required for every firearms purchase at a licensed gun dealer. *See* Ex. 1, [redacted] Depo. at 53:19-24, 66:20-21, 69:2-5. Academy thus recognized Kelley as a Colorado resident. *See id.* Colorado prohibits the sale of large capacity magazines containing any more than 15 rounds. *See* Col. Rev. Stat. §§ 18-12-301, 302. Academy admits it would have been illegal for Kelley to purchase or possess the Ruger in Colorado because of the included 30-round

magazine. *See* Ex. 1, [redacted] Depo. at 189:12-19 ("[I]n the state of Colorado, from a Colorado FFL ['federal firearms licensee'], Mr. Kelley cannot purchase a[n] AR-556 with a 30-round magazine . . ."). Academy also admits that it would violate Colorado law if it *shipped* an AR-556 Model 8500 rifle with the 30-round LCM to a gun dealer in Colorado for a Colorado resident. *Id*. at 190:1-7 ("[I]f we shipped the firearm with the 30-round magazine, [we] would be violating Colorado law, yes."). Kelley could not even legally bring the Ruger and its magazine back to Colorado. *See id.* at 69:25-70:6.

Recognizing that Colorado prohibits the sale of a firearm with a 30-round magazine, Ruger does not sell its Model 8500 AR-556 in Colorado. *Id*. at 16:22-24. Instead, it markets and sells a different model—the Model 8511 AR-556—with a 10-round magazine in order to comply with Colorado's ban on LCMs. *Id*. at 82:18-24. The marketing materials Ruger includes with the Model 8511 AR-556 recognize that "[t]he model is legal for sale in the following *otherwise restricted locations: Colorado and Maryland*." *Id*. at 100:5-7 (emphasis added).

As Academy was well aware, the federal Gun Control Act, 18 U.S.C. §§ 921, *et. seq.* ("GCA") requires that when an Academy store in Texas sells a long gun to the resident of a different state, the transaction must satisfy all "conditions of sale" in Texas as well as the non-resident's home state. *See* 18 U.S.C. § 922 (b)(3); *see also* Ex. 1, [redacted] Depo. at 109:19-25, 162:16-164:17, 108:1-5 ("Q. Do you understand, [redacted], that when you sell a firearm to a citizen of another state, that you have to comply with the firearm laws of that person's state? A. The reciprocity law, yes, I am familiar with it."). [redacted], as Academy's compliance officer, is responsible for "ensur[ing] that Academy complies with . . . state, federal, local laws, yes." *Id*. at 11:8-11. Academy, through [redacted], acknowledges that, as a FFL, it has a duty to know all firearms laws in all United States jurisdictions. *See id*. at 271:1- 10.

Academy concedes that the Ruger it sold to Kelley was the weapon used to transform a place of worship in Sutherland Springs into a killing zone. *See* Def. Mtn. at 5; Defendant's Original Answer to Plaintiffs' Original Petition in the McMahan *et. al.* case ("McMahan Ans.") at 2 ¶ 3. Academy's illegal sale of the Ruger to Kelley directly caused Plaintiffs' deaths or injuries.

ACADEMY DID NOT SATISFY ITS BURDEN IN SEEKING SUMMARY JUDGMENT

To prevail on its motion for summary judgement, a defendant "must show that no genuine issue of material fact exists and that [it] is entitled to judgment as a matter of law." *Cantu v. Peacher*, 53 S.W.3d 5, 8 (Tex. App. Ct. San Antonio 2001), *pet. denied* (reversing grant of summary judgment); *see also Mendoza v. Old Republic Ins. Co.*, 333 S.W.3d 183, 184 (Tex. App. Ct. El Paso 2010), *pet. denied* 2010 Tex. LEXIS 946 (2010) (same); *see also* Tex. R. Civ. P. 166a(c). In deciding whether there is a "genuine issue of material fact," this Court must "indulge every reasonable inference and resolve any doubts in favor of the nonmovant" and "must assume all evidence favorable to the nonmovant is true." *See Mendoza*, 333 S.W.3d at 185; *Cantu*, 53 S.W.3d at 8. Academy has not and cannot meet this burden.

ARGUMENT AND AUTHORITIES

I. PLCAA Does Not Protect Academy Since Plaintiffs' Case Is Not A "Qualified Civil Liability Action"

Academy's primary argument is that Congress, through PLCAA, deprived this Court of authority to hear this case. Academy ignores virtually every relevant case, which all recognize that PLCAA provides no protection to dealers who knowingly violate gun laws and thereby enable deadly shootings. Academy also ignores the wealth of authority and evidence that establish that it violated federal firearms law in selling the Ruger to Kelley.

PLCAA purports to require state courts to dismiss certain "qualified civil liability action[s]" against firearms manufacturers and sellers. To constitute a "qualified civil liability

action," a case must both (1) meet the general definition in 15 U.S.C. § 7903(5)(A) and (2) not fall into any of the exceptions in § 7903(5)(A)(i-vi), which exclude certain cases from the reach of the general definition. As relevant here, PLCAA defines "qualified civil liability action" as follows:

(5) Qualified civil liability action

(A) In general

> The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include -
>
> . . .
>
> (ii) an action brought against a seller for negligent entrustment or negligence per se;
>
> (iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . . [examples omitted]

15 U.S.C. § 7903.

Plaintiffs' claims do not qualify as "qualified civil liability actions" because: (1) Academy's knowing violation of law removes any PLCAA immunity under the "predicate" exception; (2) applying federalism principles and Supreme Court precedent, Plaintiffs' claims do not meet the general definition contained in § 7903(5)(A); and (3) PLCAA allows Plaintiffs' negligence per se and negligent entrustment claims even if other claims are barred. As such, PLCAA provides no basis to dismiss Plaintiffs' claims.

A. Summary Judgment Should Be Denied Because Academy Knowingly Violated § 922(b)(3) In A Way That Proximately Caused Plaintiffs' Harm, Triggering PLCAA's "Predicate" Exception.

1. Defendant Knowingly Violated § 922(b)(3) When It Sold The Ruger To Kelley.

Assuming, *arguendo*, that this case meets the general definition of "qualified civil liability action" (which it does not, *see infra* at 23-27), PLCAA does not protect Academy because Academy "knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii). This exception is known as the "predicate" exception and every court that has addressed this exception has recognizes that PLCAA provides no basis to dismiss any claim—including negligence claims—where the "predicate" exception is satisfied. *See, e.g., Corporan v. Wal-Mart Stores East, LP*, 2016 U.S. Dist. LEXIS 93307, *6-*11 (D. Kan. 2016), attached as Exhibit 6 (denying a motion to dismiss against a gun dealer who sold a gun in an alleged straw sale that was later used in shooting, the court held that "state law negligence claims" would "survive the PLCAA filter" based on allegations that the dealer had violated one or more statutes); *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 351, 353 (E.D.N.Y. 2007) (same); *Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 151 (N.Y. App. Div. 2012), *amended by* 103 A.D.3d 1191 (N.Y. App. Div. 2013) (same); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 432–35 (Ind. App. 2007), *transfer denied* 915 N.E.2d 978 (Ind. 2009) (similar finding); *Chiapperini v Gander Mtn. Co., Inc.*, 13 N.Y.S.3d 777, 787 (Sup. Ct. 2014) (similar finding); *Englund v. World Pawn*, No. 16-CV-00598, Letter Order at 5 (Ore. Cir. Ct. 2018), attached as Exhibit 7 (denying summary judgment against gun dealer who sold gun in alleged straw sale used in shooting, the court held "[i]f plaintiff proves a predicate exception, the lawsuit survives, including all claims such as negligence and public nuisance").

Academy cannot and does not contest the fact that PLCAA provides no protection if Academy violated 18 U.S.C. § 922(b)(3). Rather Academy simply argues that, as a matter of law, it did not violate this statute. *See* Def. Mtn. at 17. Academy is wrong.

Section 922(b) provides, in relevant part:

> (b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver-
>
> . . .
>
> (3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, **and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States** (and **any** licensed manufacturer, importer or **dealer shall be presumed**, for purposes of this subparagraph, in the absence of evidence to the contrary, **to have had actual knowledge of the State laws** and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes . . .

18 U.S.C. § 922 (b)(3) (emphasis added). This clear and unambiguous language prohibited Academy from selling the Ruger to Kelley unless the "sale, delivery and receipt fully compl[ied] with the legal conditions of sale" imposed by both the seller's state (Texas) *and* the buyer's state (Colorado) as incorporated into federal law. 18 U.S.C. § 922(b)(3). Section 922(b)(3) incorporates Colorado law *into the federal statute* and requires Academy to obey the Colorado LCM restriction as a matter of *federal law* when it sells a long gun to a Colorado resident at any of its Texas stores.

Academy concedes that "*federal law* required Academy to meet the legal conditions for sale of [a] 'firearm' in Colorado" when it was selling a long gun to Kelley at its Texas store.

See McMahan Ans. at 3 ¶ 5; Def. Mtn. at 3. While Academy suggests that Plaintiffs are trying to apply Colorado law in Texas (*see* Def. Mtn. at 18-19), it is federal law—namely § 922(b)(3)—that requires Academy's Texas store, when selling a firearm to a Colorado resident, to obey the same restrictions that would apply if it were a Colorado store selling to a Colorado resident. *Id.* The plain language of § 922(b)(3) makes practical sense: it prevents dealers from enabling dangerous buyers to evade their state's gun laws by traveling across state lines to acquire more dangerous weapons than they could buy in their home state. Additionally, the required ATF Form 4473 filled out on April 7, 2016, when Academy sold Kelley the Ruger, expressly reminded Academy that: "In determining the lawfulness of the sale or delivery of a long gun *(rifle or shotgun)* to a resident of another State, the seller is presumed to know the applicable State laws and published ordinances in both the seller's State and the buyer's State." *See* ATF Form 4473 at 3, attached as Exhibit 8.

Academy's "sale, delivery and receipt" of the Ruger (a covered "firearm" under 18 U.S.C. § 922(b)(3)) did not "fully comply" with the Colorado "conditions of sale" incorporated into 18 U.S.C. § 922(b)(3) for at least two independent reasons. First, the 30-round magazine prohibited under Colorado law as incorporated into federal law was a "component part" of the Ruger. Second, the prohibited magazine was an inseparable part of a covered "firearm" transaction because it was sold in the box with the Ruger as a single unit.

Academy admits it would have been illegal for Kelley to purchase and/or possess the Ruger he acquired from Academy in his home state of Colorado and that it would be illegal for Academy to ship the Ruger to Kelley in Colorado because the 30-round magazine included as part of the Ruger was prohibited in Colorado. *See* Ex. 1, [redacted] Depo. at 189:12-19, 190:1-7. Academy also admits that it knew that federal law requires it to comply with Colorado law (incorporated by § 922(b)(3)) when selling long guns to Colorado residents in its Texas stores. *See Id.* at 162:16—

164:17; 108:1-5; *see also* Academy Documents Bates-Stamped 00059 and 000132, attached as Exhibit 9 (map in operation at the time of Academy's sale of the Ruger to Kelley showing Academy's recognition that laws of other jurisdictions—including the City of Denver—apply to long gun sales to out-of-state residents at its Texas stores); Ex. 1, [redacted] Depo. at 105:4-23. Academy further admits that federal law prohibits it from selling a long gun to a Colorado resident if the gun has a "component part" that is prohibited in Colorado. *See* Ex. 2, [redacted] Depo. at 59:5-12. Nonetheless, Academy failed to obey Colorado's LCM provision as incorporated into § 922(b)(3). *See* Ex. 9, Academy 00059 and 000132.

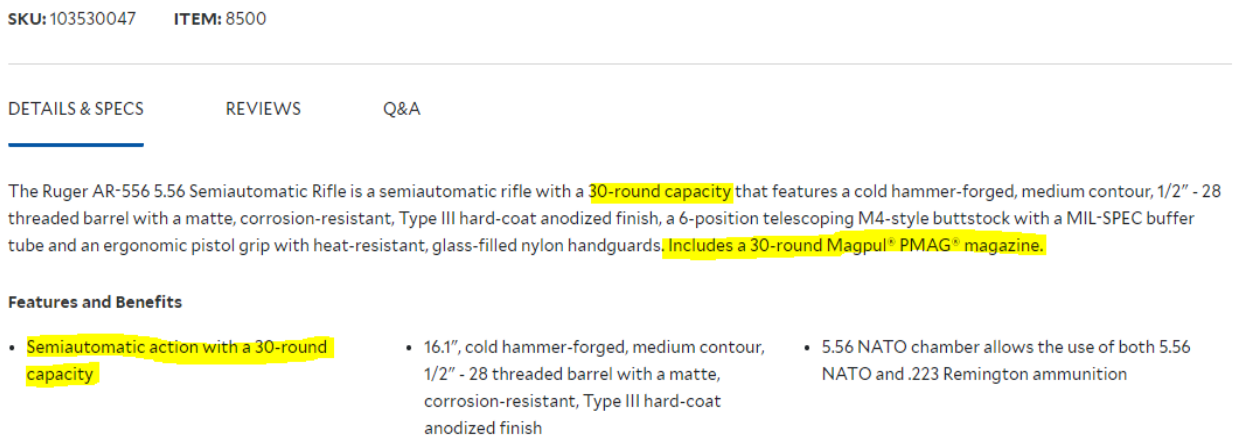
The summary judgment evidence shows that Academy knowingly violated § 922(b)(3) when it sold the Ruger with the included LCM to Kelley. This violation proximately caused Plaintiffs' harm. Indeed, had Academy obeyed the law, Kelley would not have acquired the Ruger that he used to inflict harm. Hence, Academy is not entitled to summary judgment.

a. Defendant Violated § 922(b)(3) Because The Prohibited LCM Was A "Component Part" Of The Ruger.

Academy incorrectly claims that, as a matter of law, the Ruger "firearm" covered by the statutory definition used in § 922(b)(3) does not include the magazine. *See* Def. Mtn. at 24-25. Academy must take this position to evade liability because, as it conceded, the sale to Kelley violated § 922(b)(3) if the LCM is a "component part" of the Ruger. *See* Ex. 2, [redacted] Depo. at 59:5-12. Academy's argument in this regard is untenable based upon the facts and evidence. Indeed, the Code of Federal Regulations, ATF materials, Ruger's business practice, and Academy's own business practices all unequivocally establish that the LCM was a "component part" of the Ruger, such that § 922(b)(3) applied to bar the sale to Kelley. *See, e.g.*, 27 C.F.R. § 53.61(b)(5)(ii); *see also* Ex. 5, Vince Aff. at 4(i), 4(k), 4(v).

First, federal law unequivocally states that the magazine the manufacturer includes with the Ruger is a component of the gun: "[c]omponent parts include items such as . . . *a magazine* . . . when provided by the manufacturer . . . for use with the firearm in the ordinary course of commercial trade." 27 C.F.R. § 53.61(b)(5)(ii) (emphasis added); *see also* Ex. 5, Vince Aff. at 4(i), 4(k) 4(v). It is undisputed that Ruger packages the LCM in the box for use in the ordinary course of business. *See* Ex. 1, [redacted] Depo. at 104:14-15. Academy concedes that 27 C.F.R. § 53.61(b)(5) recognizes a magazine as a "component part." *See* [redacted] Depo. at 88:7-18, attached as Exhibit 10. Academy admits that ATF guidance on firearms nomenclature also calls the LCM sold as part of the Ruger transaction a "component part" of the firearm. *See* Ex. 1, [redacted] Depo. at 140:3-21. ATF's website agrees with this nomenclature document regarding listing manufacturer-included magazines like the LCM packaged with the Ruger as a component part. *See* Ex. 5, Vince Aff. at 4(j).

Additionally, Academy recognizes that the LCM is a "component part" of the Ruger in its advertisements of the Ruger on its website. For one, Academy assigns the same product or SKU number to cover both the Ruger and the "include[d]" 30-round magazine, and it also includes the LCM in the price of this single product. *See* Ex. 3, https://www.academy.com/shop/pdp/ruger-ar-556-556-semiautomatic-rifle#repChildCatid=1364736 (highlights added) (11/9/2018 1:30 PM), (The SKU No. for the AR-556 Model 8500 (103530047) "[i]ncludes a 30-round Magpul® PMAG® magazine" along with the rifle as part of the unit being purchased and Academy advertises a "30-round capacity" as one of the features and benefits of the AR-556 rifle):



SKU: 103530047 **ITEM:** 8500

DETAILS & SPECS REVIEWS Q&A

The Ruger AR-556 5.56 Semiautomatic Rifle is a semiautomatic rifle with a 30-round capacity that features a cold hammer-forged, medium contour, 1/2" - 28 threaded barrel with a matte, corrosion-resistant, Type III hard-coat anodized finish, a 6-position telescoping M4-style buttstock with a MIL-SPEC buffer tube and an ergonomic pistol grip with heat-resistant, glass-filled nylon handguards. Includes a 30-round Magpul® PMAG® magazine.

Features and Benefits

- Semiautomatic action with a 30-round capacity
- 16.1", cold hammer-forged, medium contour, 1/2" - 28 threaded barrel with a matte, corrosion-resistant, Type III hard-coat anodized finish
- 5.56 NATO chamber allows the use of both 5.56 NATO and .223 Remington ammunition

See also, Academy Documents Bates-Stamped: 002308 and 002309, attached as Exhibit 11 (the transaction display and transaction snapshot document from Academy assigning SKU number 103530047, as advertised on Academy's website, to the Kelley sale).

Ruger also recognizes that the sale of the gun includes the packaged LCM, as it created the Model 8511 with a smaller magazine precisely because it recognized that the Model 8500 could not be sold in Colorado because it contained a non-compliant component part (the LCM). *See* Ex. 1, [redacted] Depo. at 82:18-24. The smaller magazine size is the only significant difference between the Model 8500 and Model 8511. *See* Ex. 5, Vince Aff. at 4 (m). Thus, Academy's own conduct—and that of Ruger's—confirms that the LCM was a "component part" of the Ruger sold to Kelley. Academy thus violated § 922(b)(3).

In an effort to avoid this inescapable conclusion, Academy claims that Plaintiffs seek to alter the definition of "firearm" as used in § 922(b)(3), because the definition of this term imported from 18 U.S.C. § 921(a)(3) does not include the word "magazine." *See* Def. Mtn. at 24-25. However, 18 U.S.C. § 921(a)(3) also does not include the words "firing pin," "trigger," "barrel," or other "component parts" of a "firearm." Congress's choice not to list every component part does not negate the fact that a magazine sold in the box is classified as a "component part" any more than it changes the fact that a "firing pin" is an integral part of a firearm.

Academy also suggests that recognizing a "firearm" as including "component parts" of "firearms" would somehow create surplusage in a provision of PLCAA which provides immunity to sellers of both "firearms" and the "component parts" of "firearms." *See* Def. Mtn. at 25. This analysis is logically flawed. A "firearm" necessarily consists of its "component parts," even though some may be sold separately as well. The language Academy refers to in PLCAA simply clarifies that both the manufacturers of completed "firearms" *and* individual "component" parts have immunity from certain suits.

b. Even If An LCM Were Not "Component Part" Of A "Firearm," Academy Violated § 922(b)(3) Because The LCM Was An Indivisible Part Of the "Sale" Of A "Firearm."

Even if not deemed a "component part" of a "firearm," the LCM was, at a minimum, an integral and inseparable part of the "sale" of the Ruger. As such, Academy violated § 922(b)(3) because the sale did not "fully comply with the conditions of sale" of a "firearm" under both Texas and Colorado law as incorporated into federal law.

Academy suggests the sale of the magazine was separate from and merely "incidental" to the sale of the "firearm" covered by 18 U.S.C. § 922(b)(3). *See* Def. Mtn. at 3. The evidence conclusively establishes that this was not the case. The 30-round magazine was included in the box, packaged by the manufacturer. *See* Ex. 1, [redacted] Depo. at 104:14-15. Academy rang up one price for the firearm, which included the magazine and everything else in the box. *See* Ex. 11, Academy Documents Bates-Stamped: 002308 and 002309. *See also* Ex. 3, https://www.academy.com/shop/pdp/ruger-ar-556-556-semiautomatic-rifle#repChildCatid=1364736 (highlights added) (11/9/2018 1:30 PM). Academy used only one SKU, or "stock keeping unit" number, for the gun and magazine, because it was one product, and it sold the Ruger to Kelley in one transaction. *See also*, Ex. 3 and Ex. 11. Academy also admits

that the Ruger is wholly dependent upon the packaged magazine to fire as intended and advertised (as a "semiautomatic rifle"). *See* Ex. 4, [redacted] Depo. at 11:16-19; Ex. 1, [redacted] Depo. at 27:24-28:2; *see also* Ex. 5, Vince Aff. at 4(i). The magazine is therefore an "integral" part of the Ruger. *See id.*

Academy recognizes this reality: it always sells long guns like the Ruger with the magazine included by the manufacturer, and has rules prohibiting stores from removing the magazine from the box. *See* Ex. 4, [redacted] Depo. at 115:23-116:20; Ex. 1, [redacted] Depo. 42:25-43:2. Further, while the Ruger can *theoretically* function as a single shot rifle, Academy admits that it is impractical—and even dangerous—to operate the Ruger without a magazine. *See* Ex. 4, [redacted] Depo. at 157:5-8 ("Q. Have you ever tried to shoot an AR-15 single? A. Yes, I have. It can be done. You just gotta be real careful or you'll cut your finger off.").

Congress could have written § 922(b)(3) to only require that the buyer be *permitted to receive or possess the firearm* under the law of both applicable states. But Congress chose broader language to require the dealer to "fully comply" with "conditions of sale" required by the buyer's state when transferring a covered "firearm." By its plain language, the statute requires all circumstances of the *transaction* involving a covered "firearm" to comply with Colorado law as incorporated into federal law.[1] *See* 18 U.S.C. § 922 (b)(3) .

Case law further supports that § 922(b)(3) requires that all of the circumstances of a long gun *transaction* comply with the law of the buyer's jurisdiction. The Fourth Circuit found that when a firearm is included as an integral part of a package of items, the firearm and the other items being sold are part of a "single sale" rather than distinct but related purchases. *United States v.*

[1] Because the statute unambiguously demands that the whole transaction comply with the laws of the buyer's jurisdiction, Defendant's "rule of lenity" argument (which deals with interpretation of statutory ambiguity) has no application. *See* Def. Mtn. at 26.

Bullard, 301 Fed. App'x. 224, 227-228 (4th Cir. 2008) (upholding sentencing enhancement for using gun "in connection with" a felony where defendant sold a gun and drugs together in a package that constituted a "single sale")*; see also Bryan v. United States*, 524 U.S. 184, 198 (1998) (§ 922(b)(3) prohibits dealer sales "to any person who the licensee knows or has reasonable cause to believe does not reside in the licensee's State, except where, *inter alia*, ***the transaction fully complies*** with the laws of both the seller's and buyer's State.") (emphasis added).

The inclusion of the 30-round LCM with the Ruger as marketed, packaged, and sold by Academy, is similar to an automobile dealer selling a vehicle with four tires attached. Academy essentially argues that tires are accessories, even when a vehicle is sold with four tires attached. This interpretation makes no practical or legal sense. Although tires can be sold separately from a car, when a car is sold with tires packaged as part of a car and included in the price they are deemed a part of the purchase of that car. Similarly, even though LCMs can be sold separately from firearms, when a firearm is packaged, marketed, and sold with a 30-round LCM and the LCM is factored into the price of the product the consumer purchases, that LCM is an integral and inseparable part of the sale of that firearm. That is precisely what happened here. Academy lists the Ruger with the included LCM as part of the same SKU or "stock keeping *unit*" (emphasis added) because it recognizes this reality. *See* Ex. 3 https://www.academy.com/shop/pdp/ruger-ar-556-556-semiautomatic-rifle#repChildCatid=1364736 (highlights added) (11/9/2018 1:30 PM); *see also* Ex. 4, [redacted] Depo. at 11:16-19; Ex. 1, [redacted] Depo. at 27:24-28:2; Ex. 5.

2. Plaintiffs Are Not Asking This Court To Apply Colorado Law.

Defendant misunderstands the applicable law when it contends that Plaintiffs seek to apply Colorado state law in Texas. *See* Def. Mtn. at 18-19. Plaintiffs do not contend that when Academy's Texas store illegally sold the Ruger, with the LCM, Academy could have been charged

with violating *Colorado law*. Rather, Academy violated *federal law*—18 U.S.C. § 922(b)(3)—which incorporates the firearms laws of an out-of-state buyer's jurisdiction.

By violating the law, Academy also violated the standard of care that Academy owed to Texas residents, such as Plaintiffs. Multiple courts have recognized that holding a dealer responsible for violating the law of an out-of-state buyer's jurisdiction as incorporated into *federal law* by 18 U.S.C. § 922(b)(3) does not involve any impermissible extraterritorial application of state law. *See, e.g., Gladden v. Bangs*, 2012 U.S. Dist. LEXIS 23304, *3 (E.D. Va. 2012), attached as Exhibit 12 (upholding ATF's revocation of Virginia dealer's license where one of licensee's violations included breaking 18 U.S.C. § 922(b)(3) by "transferring a firearm to an individual who was a resident of New Jersey in violation of New Jersey state law."); *Barany v. Van Haelst*, 2010 U.S. Dist. LEXIS 128290, *6, *18-21 (E.D. Wash. 2010) attached as Exhibit 13 (Washington dealer transferred firearms to a California resident in violation of 18 U.S.C. § 922(b)(3) because California law requires a ten-day waiting period and does not provide for the sale of firearms to California residents in other states). Academy has not cited any case supporting its claim that Plaintiffs seek an impermissible extraterritorial application of state law under § 922(b)(3).

Defendant's own business practices also reflect a recognition that, under § 922(b)(3), Academy must follow the laws of the seller's and the buyer's state when a long gun is purchased by an out-of-state resident. [redacted], the Academy employee who signed off on the sale to Kelley, testified that Academy circulates a map that instructs its employees "who we can and cannot sell long guns to." *See* Ex. 4, [redacted] Depo. at 9:8-16, 38:3-4; *see also* Ex. 9, Academy 00059 and 000132. [redacted] further admitted that had Kelley been from Denver, Colorado, Academy would not have been able to sell him the Ruger, "because it states on the map that we have that residents from Denver, Colorado, may not purchase MSRs ['modern sporting rifles']."

Ex. 4, [redacted] Depo. at 38:8-17, 39:6-12. Academy employees rely upon the map and assume that the map accurately reflects firearms laws. *See id*. at 38:12-25, 49:5-9.

Academy distributes this map to employees because it recognizes that the laws of other states and municipalities are incorporated into § 922(b)(3) and must be followed in long gun sales to residents of foreign jurisdictions. Academy's corporate compliance officer conceded that Academy has a duty to know all firearms laws in all United States jurisdictions, to stay abreast of developments in the laws, and to update the map accordingly. *See* Ex. 1, [redacted] Depo. at 271:1-10 ("Academy has a duty to know what the laws are in every state in the union; is that fair? . . . A. Academy needs to know the laws, yes, that's correct. Q. Academy needs to keep up with the laws, correct? Yes, Academy needs to keep up with all the laws."); *See* id. at 193:10-21 (map is continually updated with the assistance of outside counsel to reflect shifts in the law).

Academy failed to perform this duty. At the time of the sale, the map was inaccurate in that it failed to alert Academy employees that residents of Colorado were forbidden from purchasing the Ruger Model 8500. The map is irrefutable evidence that Academy knew it had a duty to learn about and follow the laws of other jurisdictions as incorporated into § 922(b)(3) and applicable to the sale to Kelley. Despite knowing that Colorado law—including Colorado's LCM restriction—was incorporated into the federal law applicable to long gun sales in Texas to Colorado residents like Kelley, Academy's map and training protocols did not accurately inform its employees that the sale to Kelley was illegal.

3. Defendant Attempts To Place A Heightened Pleading Requirement on Plaintiffs That Is Unfounded In Texas Law.

Defendant suggests that even if it violated § 922(b)(3), and even if PLCAA therefore provides no basis to dismiss Plaintiffs' case, this Court should dismiss the case under PLCAA because Plaintiffs did not allege a violation of federal law with sufficient specificity in their

petitions to now invoke the "predicate" exception. *See* Def. Mtn. at 13-14. This argument is contrary to Texas law, and seeks to impose a higher pleading standard on Plaintiffs than is required.

As Texas is a notice pleading jurisdiction, a "petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. The purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense." *Kopplow Dev., Inc. v. City of San Antonio*, 399 S.W.3d 532, 536 (Tex. 2013) (citing *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982)). Plaintiffs' pleadings have more than met this burden.

Defendant does not suggest that it did not have notice of the claims against it, and Defendant's motion confirms that it had sufficient information "to prepare a defense." Defendant can cite to no authority that Plaintiffs were obligated to plead a statutory violation with more specificity in order to rebut a defense that Defendant might raise. A *knowing* violation of law is not an element of a simple negligence or a negligence per se claim under Texas law. Defendant is essentially arguing that Plaintiffs were required to plead, in their initial petition: "If Defendant claims this case is barred by PLCAA, this is why it is not barred …". Texas law does not require Plaintiffs to anticipate and specifically plead responses to potential defenses.

Under Texas's "fair notice" standard, "[a negligence per se] petition is sufficient if it gives fair and adequate notice of the *facts* upon which the pleader" is invoking a statute as distinct from citing the statute itself. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896-97 (Tex. 2000). In *Horizon*, the plaintiff cited the *wrong statutory provision*, but the Court reasoned that the allegations in the pleading and the unique nature of the provision being invoked were sufficient that the defendant was provided notice that plaintiff was relying upon that provision. *See Id.*

Similarly, Plaintiffs' petitions clearly allege the "facts" upon which they base their claim for a violation of § 922(b)(3) even though they do not expressly cite to the statue. Indeed, this

very narrow provision of the federal GCA is the only possible law that Plaintiffs could have been referencing in describing defendant's illegal behavior in selling the Ruger to Kelley as prohibited by virtue of his residence in Colorado. *See, e.g.*, Solis Pet. at 2 ("A Texas gun dealer (Academy) cannot sell a firearm and deliver that firearm to a citizen of another State if that sale would not be legal in the purchaser's State of residence (Colorado)").

The fact that Plaintiffs provided Academy with sufficient notice of their negligence per se claim is reinforced by *Peek v. Oshman's Sporting Goods, Inc.*, 768 S.W.2d 841, 844-845 (Tex. App. Ct. San Antonio 1989), *writ denied*. Although the San Antonio Court of Appeals ultimately held that there were not sufficient factual allegations to support a negligence per se claim in that case, the court engaged in a careful analysis of the facts of the complaint as applied to a possibly implicated provision of the federal GCA, rather than "bas[ing its decision] upon an absence of specific pleading of a statute upon which a claim of negligence per se might be based." *See id* at 844. *See also Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 149 (N.Y. App. Div. 2012), *amended by* 103 A.D.3d 1191 (N.Y. App. Div. 2013) (no requirement to plead statutory basis under PLCAA or New York law). Here, unlike in *Peek*, Plaintiffs clearly alleged facts showing that Academy knowingly and illegally sold a Ruger Model 8500 which had a prohibited LCM as a "component part" and included a prohibited LCM as an inseparable part of a covered "firearm[s]" transaction to a Colorado resident in violation of 18 U.S.C. § 922(b)(3).

Further, Academy does not contest that federal law can buttress and assist in defining the applicable standard of care owed by a Texas defendant to a Texas plaintiff, regardless of whether the federal law is pled as a negligence per se violation itself. Plaintiffs' allegations are more than sufficient to provide "fair notice" of Plaintiffs' claims—whether sounding in negligence, negligence per se, or other applicable law. They are also sufficient to survive summary judgment.

4. There Is, At Minimum, A Genuine Issue of Material Fact As Whether Academy's Violation Of § 922(b)(3) Proximately Caused Plaintiffs' Harm.

Academy makes a half-hearted suggestion that Plaintiffs have not raised a material issue of fact as to whether Academy's violation of federal firearms law caused Plaintiffs' harm. Specifically, Academy suggests that Plaintiffs "certainly cannot prove that Academy sold any of the magazines used by Kelley in his attack." Def. Mtn. at 8 n. 18. Academy does not cite to any authority or engage in any analysis on this point; it does not even expressly state that it is entitled to summary judgment on the issue of proximate cause. In any event, Academy's own testimony establishes that whether or not Kelley used this specific LCM included in the Ruger packaging in the attack, Kelley would not have had the Ruger at all had Defendant abided by § 922(b)(3). Hence, at minimum, there is a genuine issue of material fact as to whether Academy's violation of the law proximately caused Plaintiffs' harm.

[redacted] conceded that, had Academy's map of out-of-state sales properly displayed that the sale of a Ruger AR-556 Model 8500 to a Colorado resident visiting his Texas store was prohibited in 2016 due to the inclusion of the LCM as part of the sale of the Ruger, he would not have sold the Ruger to Kelley. *See* Ex. 4, [redacted] Depo. 89:6-16; *see also* Ex. 9, Academy 00059 and 000132. [redacted] further indicated that Academy, in its training of employees, never provided him with the text of the statutes and regulations—including 18 U.S.C. § 922(b)(3)—that he was required to know as an agent of an FFL. *See* Ex. 4, [redacted] Depo. at 159:15-160:3 ("I have not seen all the policies. I'm going by the policies that Academy gives us in place."). Rather than examining relevant laws, [redacted] acknowledges that Academy employees relied entirely upon the map, stating, "[e]verything we get is going by this map," "[w]e … abide by the information right here, going by the map for Academy" and "we do trust in that map because regulations change all the time." *See id.* at 163:21-22.*; id*. at 56:22-23; *id.* at 49:5-9. Academy was negligent in training

its employees about compliance with applicable federal firearms laws, and Kelley would not have gotten the Ruger had Academy in fact trained its employees to comply with 18 U.S.C. § 922(b)(3). *See* Ex. 5 Vince Aff. at 4(r). This establishes, at the very least, a genuine issue of material fact on the issue of whether Academy's violation of 18 U.S.C. § 922(b)(3) proximately caused Plaintiffs' harm. The existence of this question of fact precludes summary judgement on this issue.

B. Summary Judgment Should Also Be Denied Because Plaintiffs' Harm Was Not "Solely Caused" By The Criminal Acts Of A Third Party And Therefore Is Not A "Qualified Civil Liability Action."

1. PLCAA Must Be Read To Allow Plaintiffs' Claims In Order To Protect Principles Of Federalism And State Authority.

Academy's claim that Congress has prohibited Texas courts from applying Texas tort law to provide redress to these Texas Plaintiffs is contrary to fundamental principles of federalism. The Supreme Court has emphasized that federal laws that intrude on state sovereignty or upset the balance of powers between state and federal governments must be construed in a way that maximally protects state authority. Such laws cannot be read to intrude on state authority unless Congress has clearly stated its intent to do so. PLCAA does not come close to a clear statement of intent to deprive Texas of its sovereign authority to determine this civil justice law claim.

In *Gregory v. Ashcroft*, the Supreme Court explained that courts construing a federal law that preempts state law must apply the "plain statement rule," under which "it is incumbent upon the [] courts to be certain of Congress' intent before finding that federal law overrides [the usual constitutional balance of federal and state powers]." 501 U.S. 452, 460, 470 (1991) (citations omitted); *see also United States v. Bass*, 404 U.S. 336, 349 (1971). The Texas Supreme Court has similarly recognized that a "plain statement" is required for a legislature to abrogate common law rights. *See Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000) ("We have consistently declined to construe statutes to deprive citizens of common-law rights unless the Legislature

clearly expressed that intent."). In the *absence* of the required "plain statement" that Congress intends to deprive states of authority, courts must narrowly construe language in federal law so as to minimize the scope of federal preemption and the resultant intrusion on the sovereignty of the states. In fact, Supreme Court case law requires courts to go out of their way to protect state sovereignty when federal statutes lack a "plain statement" in favor of usurping state authority.

In *Gregory*, a provision of the Missouri Constitution which required judges to retire at age 70 appeared to violate the Federal Age Discrimination in Employment Act of 1967 ("ADEA"). 501 U.S. at 455-56. To prevent intrusion into Missouri's sovereign right to structure its government (by setting retirement ages for judges), the U.S. Supreme Court rejected a statutory construction that was more consistent with the plain text of the statute and read the ADEA to exempt judges under an exception for "'appointee[s] on the policymaking level.'" *Id.* at 465. The Court recognized that its interpretation was "an odd way for Congress to exclude judges," "particularly in the context of the other exceptions that surround [the exclusion applicable to judges]." *Id*. at 467. However, the Court would not construe federal law as displacing Missouri's law unless it was "absolutely certain" about Congress' intent. *Id*. at 464. The Court was "not looking for a plain statement that judges are excluded" from the coverage of the federal statute, but instead, decided that it "[would] not read the ADEA to cover state judges unless Congress ha[d] made it clear that judges [we]re *included*" in its coverage. *Id.* at 467 (emphasis in original).

The U.S. Supreme Court went further in *Bond v. United States*, which considered a federal law that broadly criminalized chemical weapons use, without exceptions for local crimes such as the one Bond committed. 134 S. Ct. 2077 (2014). Justice Scalia stated that "it is clear beyond doubt that [the act] cover[ed] what Bond did . . ." *Id*. at 2094 (Scalia J., concurring). Nonetheless, because a plain reading of the statute would lead to the federal government "'dramatically

intrud[ing] upon traditional state criminal jurisdiction . . .'", the Court read ambiguity into otherwise unambiguous language, finding that the "ambiguity derives from the improbably broad reach of the key statutory definition . . .". *Id.* at 2088 (quoting *Bass*, 404 U.S. at 350); *id.* at 2090 (Scalia, J., concurring). The Court held that the law could not constitutionally be applied to Bond because "[t]he Government's reading of [a federal statute] would 'alter sensitive federal-state relationships,' convert an astonishing amount of 'traditionally local criminal conduct' into a 'matter for federal enforcement,' and 'involve a substantial extension of federal police resources.'" *Id*. at 2091-92 (Scalia, J., concurring) (quoting *Bass*, 404 U.S. at 349-50). *Bond* makes clear that courts must limit overbroad language in federal statutes—even if unambiguous, and *certainly* where ambiguous—so as to minimize intrusions on core areas of state sovereignty.

The question for this Court, under *Bond* and *Gregory*, is not whether PLCAA clearly *excluded* claims like Plaintiffs' from the definition of prohibited "qualified civil liability action[s]." *See Gregory*, 501 U.S. at 467. Instead, the question is **whether Congress has made it clear that such claims are to be *included* in the definition of "qualified civil liability action[s]" which Texas (and other state) courts are deprived of authority to hear**. *See id.* PLCAA comes nowhere close to making the required "plain statement" in favor of broad preemption that would support Defendant's interpretation of PLCAA that would provide immunity in this case.

2. PLCAA Was Not Meant To Bar Claims Like Plaintiffs' Where Gun Industry Misconduct Was One Cause Of Plaintiffs' Harm.

Applying *Bond* and *Gregory*, PLCAA does not bar Plaintiffs' claims, as Plaintiffs' harm was not "solely caused" by the criminal actions of Kelley. Instead, here, Academy's unlawful and negligent misconduct and Kelley's criminal acts were *both* causes of Plaintiffs' harm.

PLCAA bars "qualified civil liability actions" which are first generally defined as:

> a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product,

> or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—[exceptions then listed in statute].

15 U.S.C. § 7903(5)(A). The critical term "resulting from" is not defined, so its meaning can and must be informed by PLCAA's Purposes and Findings. *See Conroy v. Aniskoff*, 507 U.S. 511, 514-16 (1993) (statute must be read as a whole). PLCAA's first-stated purpose and one of its findings establish that Congress's intent was to prohibit lawsuits only where the injury was "***solely caused***" by third party criminal conduct. 15 U.S.C. § 7901(a)(6); § 7901(b)(1) (emphasis added). PLCAA was not intended to preclude actions such as this, where a gun seller's negligent and illegal conduct was also a proximate cause of a plaintiff's harm.

The word "solely" was of particular importance to Congress—one of the few changes made when an earlier version of PLCAA failed to pass the 108th Congress. *Compare* S. 1805 108th Cong. (attached as Exhibit 14), *with* 15 U.S.C. § 7901(b)(1) *and* S. 397, 109th Cong. (2005) (enacted) (attached as Exhibit 15). Since no statutory word—especially a word that may well have been critical to PLCAA's enactment—should be treated as superfluous, this rule of construction further reinforces Plaintiffs' interpretation. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991). **Academy simply ignores this critical language**.

Statements by PLCAA's author and chief sponsor, Senator Larry Craig, make clear that Congress did not intend to shield gun sellers from liability for their own tortious and unlawful conduct. Senator Craig emphasized:

> [PLCAA] is not a gun industry immunity bill because it does not protect firearms or ammunition manufacturers, sellers, or trade associations from any other lawsuits based on their own negligence or criminal conduct . . . As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun

> industry . . . The only lawsuits this legislation seeks to prevent are novel causes of action that have no history or grounding in legal principle. . . If manufacturers or dealers break the law or commit negligence, they are still liable.

151 Cong. Rec. S9061, S9099 (daily ed. July 27, 2005) (emphasis added) (attached as Exhibit 16). Other co-sponsors of the bill similarly emphasized that PLCAA was intended to shield only those gun companies who did nothing wrong, but whose guns were simply used by criminals.[2]

Consistent with the above statements, PLCAA's intent was simply to bar cases like *Kelley v. R.G. Industries, Inc.*, 304 Md. 124 (Ct. App. 1985), which imposed strict liability on a firearms manufacturer who had not acted negligently or illegally, but had sold cheap weapons favored by criminals. By contrast, Academy negligently (and illegally) sold the Ruger, and one cause of Plaintiffs' harm was Academy's own negligent and unlawful conduct.[3] Congress did not intend to deprive state courts of the authority to hold such negligent and unlawful actors accountable. PLCAA's "solely caused" language, at minimum, does not evince the clear intent to deprive state courts of authority that *Bond* and *Gregory* demand.

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[2] Sen. Orrin Hatch: "[T]his bill carefully preserves the rights of individuals to have their day in court with civil liability actions where negligence is truly an issue." 151 Cong. Rec. S9077 (daily ed. July 27, 2005) (attached as Exhibit 17); Sen. Max Baucus: "This bill . . . will not shield the industry from its own wrongdoing or from its negligence . . ." 151 Cong. Rec. S9107 (daily ed. July 27, 2005) (attached as Exhibit 18); Sen. George Allen: "This legislation does carefully preserve the right of individuals to have their day in court with civil liability actions for injury or danger caused by negligence on [sic] the firearms dealer or manufacturer . . . ." 151 Cong. Rec. S9389 (daily ed. July 29, 2005) (attached as Exhibit 19).

[3] This reading also makes sense in light of Texas courts' interpretation of proximate cause. As the Texas Pattern Jury Charge makes clear, "'[P]roximate cause' means a cause that was a substantial factor in bringing about an occurrence [], and without which cause such occurrence[] would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the occurrence[], or some similar occurrence [], might reasonably result therefore. **There may be more than one proximate cause of an occurrence**[]." Texas Pattern Jury Charge, definition of "Proximate Cause."

II. Even If Some Claims Were Barred As "Qualified Civil Liability Actions," Plaintiffs' Negligent Entrustment Claim Must Survive.

PLCAA expressly removes claims that a dealer/seller negligently entrusted a firearm from the scope of PLCAA's immunity. *See* 15 U.S.C. § 7903(5)(A)(ii). Academy's only argument against negligent entrustment liability is that a dealer cannot be liable for negligent entrustment in Texas if it sells a product. **Academy is wrong**. Negligent entrustment turns on whether there is a negligent entrustment, not on whether the entrustment is accomplished via a sale, rental or other mechanism.

Texas has embraced the definition of negligent entrustment defined in Restatement (Second) of Torts § 390 and recognized that it applies to negligent entrustments of firearms. *See Prather v. Brandt*, 981 S.W.2d 801, 806 (Tex. App. Ct. Houston 1998), *pet. denied*; *Kennedy v. Baird*, 682 S.W.2d 377, 378-80 (Tex. App. Ct. El Paso 1984), *no writ*. Both PLCAA and Rest. 2d. of Torts § 390 contain the same basic elements in defining the negligent transfer of a firearm: (1) knowledge of the potential of irresponsible or criminal misuse of the dangerous instrument; (2) entrustment of the instrument; and (3) harm resulting from the irresponsible or criminal misuse. *Compare* 15 U.S.C. § 7903(5)(B) *with* Rest. 2d. of Torts, § 390 (1965).

Academy's conduct in selling the gun to Kelley satisfies all the requisite elements of the tort of negligent entrustment under Texas law. Academy knew, by virtue of Kelley's identification and ATF Form 4473, that Kelley was an out-of-state buyer, from Colorado. As a FFL, Academy knew or should have known that individuals who are seeking to evade the law of their home state to acquire more lethal firearms and ammunition than they are permitted to own in their home state are inherently likely to misuse firearms in a criminal and dangerous manner. *See* Ex. 5, Vince Aff. at 4(c), 4(n), 4(w).

Academy had a duty to know of Colorado's LCM restriction, *see* Ex. 1, [redacted] Depo. at 271:1-10, and that out-of-state restrictions—including those of Colorado—are incorporated into applicable federal law when its Texas stores sell long guns to residents of other states. *See* Ex. 9, Academy 00059 and 000132. Academy also knew or should have known that the AR-15-style semi-automatic rifle with an LCM is a tool favored by mass shooters. *Cf. See* Ex. 5, Vince at 4(h) (listing mass shootings in which an LCM was involved, several of which also involved an AR-15 style semi-automatic rifle). Thus, at this stage it must be assumed that Academy had knowledge that Kelley was seeking to evade Colorado firearms laws to acquire a highly dangerous weapon and was likely to misuse the Ruger in an illegal and dangerous manner. *See* Ex. 5, Vince Aff. at 4(c), 4(n), 4(w). Nevertheless, Academy entrusted Kelley with the Ruger with the prohibited 30-round LCM and Kelley used that Ruger to murder twenty-six people and cause severe harm to multiple others. Academy breached its duty of reasonable care as an FFL to not sell to individuals like Kelley who present one or more "red flags" indicating likely violent or criminal intentions. *See* Ex. 5, Vince. Aff. at 4(c), 4(n), 4(w).

Academy argues that the sale of a firearm cannot constitute an "entrustment" under Texas law. *See* Def. Mtn. at 12. The Restatement 2d. of Torts, § 390—which is applied by Texas courts to define the contours of a negligent entrustment claim—expressly contradicts this position. Specifically, Comment (a) to Restatement 2d. of Torts, § 390 recognizes that an "entrustment" can occur through the act of selling an item. *See id.* ("The rule stated applies to anyone who supplies a chattel for the use of another. It applies to *sellers*, lessors, donors or lenders, and to all kinds of bailors, irrespective of whether the bailment is gratuitous or for a consideration.") (emphasis added); *cf.* 15 U.S.C. § 7903(5)(B) (PLCAA itself, by its plain language, similarly recognizes that negligent entrustment actions can apply to "seller[s].").

The cases that Academy cites in support of its position are either inapplicable, unpersuasive, misstate Texas law, or some combination of the three. *National Convenience Stores v. T.T. Barge Cleaning Co.* acknowledged that "the current section 390 of the Restatement (Second) of Torts allows recovery for negligent entrustment in a sale" but failed to recognize a negligent entrustment based on a sale based on its belief that "Texas has not adopted section 390 of the Restatement (Second) of Torts." 883 S.W.2d 684, 686 (Tex. App. Ct. Dallas 1994). **However, decisions before and after *National Convenience Stores* demonstrate that Texas has, in fact, adopted Restatement 2d. of Torts, § 390, including as it applies to firearms**. *See Prather*, 981 S.W.2d at 806; *Kennedy* 682 S.W.2d at 378-80.

Academy's reliance upon *Rush v. Smitherman* is also misplaced because *Rush* construed a prior version of the Restatement 2d. of Torts, § 390. *See* 294 S.W.2d 873 (Tex. App. Ct. San Antonio 1956), *writ ref'd*. Similarly, although *Salinas v. General Motors Corp* did suggest that a "sale" could not be the valid basis for a negligent entrustment action, this analysis was (1) predicated on the obsolete and irrelevant decision in *Rush*, and (2) is dicta because the court was analyzing a negligent entrustment claim targeted at a *manufacturer* as opposed to a seller of a product. 857 S.W.2d 944, 948 (Tex. App. Ct. Houston 2001), *no pet.*

Although no other Texas court has confronted an argument like Academy's—that the seller of a firearm cannot be liable for negligent entrustment—multiple courts in other jurisdictions have found that a sale, including the sale of a firearm, can support a negligent entrustment claim under Rest. 2d. of Torts, § 390. *See Delana v. CED Sales*, 486 S.W.3d 316, 324-26 (Mo. 2016) (negligent entrustment under Rest. 2d. of Torts, § 390 can be based on sale of a firearm); *Bernethy v. Walt Failor's, Inc.,* 653 P.2d 280, 283 (Wash. 1982) (seller of gun may be liable under statute and for negligent entrustment under Rest. 2d. of Torts, § 390 for selling to a drunk person).

The Supreme Court of Missouri has expressly rejected the argument espoused by Academy, recognizing that negligent entrustment is not "premised on the legal status of the transaction as a lease, sale, bailment or otherwise" and that "[t]he fact that Respondents supplied the firearm through a sale does not preclude Appellant's negligent entrustment claim." *Delana*, 486 S.W.3d at 325-326. This Court should follow these well-reasoned opinions and the plain language of Comment (a) of Rest. 2d. of Torts, § 390.

III. The Principle of Constitutional Avoidance Supports Plaintiffs' Claims

Under principles of constitutional avoidance, this Court must reject Academy's sweeping interpretation of the immunity afforded by PLCAA. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one construction would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Suarez Martinez*, 543 U.S. 371, 380-381 (2005).

If PLCAA is read to prohibit Texas courts from applying Texas law to grant civil justice to Texas residents who were wrongfully killed or injured as a result of Academy's illegal and negligent actions, PLCAA would raise serious constitutional issues. PLCAA would potentially violate the Due Process clause of the Fifth Amendment both in terms of its due process and equal protection components. *See City of Gary v. Smith & Wesson Corp.*, No. 45D05-005-CT-00243 (Ind. Super. Ct. 2006) (attached as Exhibit 20), *affirmed on other grounds by Smith & Wesson Corp. v. City of Gary*, 875 N.E 2d 422 (Ind. Ct. App. 2007) (holding PLCAA unconstitutional).

PLCAA might also potentially violate the Tenth Amendment by invading state sovereignty and prohibiting Texas courts from hearing civil justice claims against the gun industry that arise from violations of certain judicially-created common law standards, but permitting those same actions to exist if these standards are codified by the Texas legislature. *See, e.g., Matter of*

Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York, 131 A.D.3d 4, 5 (N.Y. App. Div. 2015) (finding that "a . . . reading of 8 U.S.C. § 1621 (d), so as to require a state legislative enactment to be the sole mechanism by which the State of New York exercises its authority granted in 8 U.S.C. § 1621 (d) to opt out of the restrictions on the issuance of licenses imposed by 8 U.S.C. § 1621 (a), unconstitutionally infringes on the sovereign authority of the State to divide power among its three coequal branches of government" and would therefore violate the Tenth Amendment). Additional concerns also arise under the Guarantee Clause of the United States Constitution. U.S. CONST. art. iv, § 4. While Plaintiffs reserve their right to challenge the constitutionality of PLCAA if the court holds that PLCAA bars their claims, they are not making that challenge at this point to avoid potential undue delay. However, the principle of constitutional avoidance still further supports Plaintiffs' reading of PLCAA as not barring Plaintiffs' claims, as Plaintiffs' interpretation is more than "plausible" and avoids serious constitutional issues.

CONCLUSION AND PRAYER FOR RELIEF

PLCAA does not bar Plaintiffs' claims. The 30-round magazine that came with Kelley's Ruger AR-556 was a "component part" of the Ruger and was integral to the sale of a "firearm" covered by 18 U.S.C. § 922(b)(3). Academy knowingly and illegally sold the firearm to Kelley, in violation of federal law, and thereby proximately caused Plaintiffs' harm. This satisfies PLCAA's "predicate exception." Because Academy has failed to carry its burden of establishing that it is entitled to summary judgment, Academy's Second Amended Motion for Summary Judgment should be denied in its entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded via e- filing service, certified mail, return receipt requested, hand delivery and/or facsimile, to all known counsel of record herein on this, the ____ day of March 2019.

/s/ Jason C. Webster
JASON C. WEBSTER

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR AND AS NEX FRIEND OF F.W., A MINOR, ROBERT LOOKINGBILL AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVE OF THE ESTATE OF E.G., DECEASED MINOR	§	**IN THE DISTRICT COURT**
Plaintiffs	§	
	§	
VS	§	
	§	**BEXAR COUNTY, TEXAS**
ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS	§	
Defendant	§	

COMBINED FOR PRETRIAL MATTERS WITH
CAUSE NO. 2018CI14368

ROSANNE SOLIS AND JOAQUIN RAMIREZ	§	**IN THE DISTRICT COURT**
Plaintiffs	§	
	§	**438th JUDICIAL DISTRICT**
VS	§	
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS	§	
Defendant	§	**BEXAR COUNTY, TEXAS**

MR 236

CAUSE NO. 2018CI23302

ROBERT BRADEN	§	**IN THE DISTRICT COURT**
Plaintiff	§	
	§	
VS	§	**408th JUDICIAL DISTRICT**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS	§	
	§	
Defendant	§	
	§	**BEXAR COUNTY, TEXAS**

CAUSE NO. 2018CI23299

CHANCIE MCMAHAN, INDIVIDUALLY AND AS NEXT FRIEND OF R.W., A MINOR; ROY WHITE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LULA WHITE; and SCOTT HOLCOMBE	§	**IN THE DISTRICT COURT**
	§	
	§	
	§	
	§	
	§	
	§	
Plaintiffs	§	
	§	
VS	§	**258TH JUDICIAL DISTRICT**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS	§	
	§	
Defendant	§	
	§	**BEXAR COUNTY, TEXAS**

AFFIDAVIT IN SUPPORT OF PLAINTIFFS RESPONSE TO ACADEMY, LTD D/B/A, ACADEMY SPORTS + OUTDOOR SECOND AMENDED MOTION FOR TRADITIONAL SUMMARY JUDGMENT

STATE OF TEXAS	§
	§
COUNTY OF HARRIS	§

Before me, the undersigned notary, on this day personally appeared Jason C. Webster, the affiant, a person whose identity is known to me. After I administered an oath to affiant, affiant testified:

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1. "My name is **Jason C. Webster**. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct."

2. "I am the lawyer representing Dalia Lookingbill, Individually and on Behalf of R.T (incorrectly listed as R.G.), a minor and as Representative of the Estate of E.G. Cause No. 2017CI23341; and Cause No. 2018CI14368 were consolidated for discovery purposes, to include motions for summary judgment. Therefore, the attached filing pertains to both Cause No. 2017CI23341; and Cause No. 2018CI14368."

3. This Affidavit in Support is being filed on behalf of all Plaintiffs contained within Cause No. CAUSE NO. 2017CI23341; and Cause No. 2018CI14368.

4. "The Exhibits 1- 20 attached to this Response are true and correct copies to the best of my knowledge."

Further Affiant sayeth not.

Jason C. Webster

SUBSCRIBED AND SWORN to before me, by Jason C. Webster on January 24, 2019.

VANESSA M RODRIGUEZ
My Notary ID # 124894570
Expires April 29, 2020

Notary Public, State of Texas

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*CONTAINS SENSITIVE DATA

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF R.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR;	IN THE DISTRICT COURT
Plaintiffs,	
vs.	
ACADEMY, LTD D/B/A ACADEMY SPORTS + OUTDOORS,	
Defendants.	BEXAR COUNTY, TEXAS
	224TH JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION

[redacted]

NOVEMBER 9, 2018

ORAL and VIDEOTAPED DEPOSITION OF [redacted], produced as a witness at the instance of certain Plaintiffs, and duly sworn, was taken in the above-styled and numbered cause on November 9, 2018, from 9:43 a.m. to 4:56 p.m., before LISA A. BLANKS, CSR, in and for the State of Texas, reported by machine shorthand, at Norton Rose Fulbright US LLP, 300 Convent Street, Suite 2100, San Antonio, Texas, 78205, pursuant to the Texas Rules of Civil Procedure and the provisions stated on the record.

A. So I'll receive compliance for firearm compliance, product safety compliance, license and permits for Academy, both motor and trailer compliance and factory compliance, and store audits.

Q. And the word compliance, would that mean your job is to make sure Academy is complying with laws that affect those various items that you just described?

A. My job is to ensure that Academy complies with -- Academy as a whole, meaning stores, D.C., corporate office -- with state, federal, local laws, yes.

Q. Okay, so if we limit ourselves to firearms for the moment, is that part of your role; are firearms included under your umbrella or your job?

A. Yes, it is.

Q. In compliance?

A. Yes, it is.

Q. And for company-wide?

A. Yes, for Academy Sports & Outdoors, that is correct.

Q. And your office is in Katy, Texas; is that correct? Is that where the corporate offices are?

A. The corporate office is in Katy, Texas.

Q. Do you have a compliance office?

A. I have an office that I sit in, yes.

Q. But is there a compliance department in Katy?

A. Yes, there is a compliance department in Katy.

Q. Are you the head of that department?

A. I am the head of compliance at Academy Sports & Outdoors in Katy, Texas.

Q. So if the CEO of Academy wanted to know something about compliance, they'd come to you?

A. Yes, they can come directly to me, correct.

Q. If the owners of Academy, whoever they are, wanted to know something about firearm compliance, they'd start with you, correct?

A. Yes, they can start directly with me.

Q. So when it comes to complying with federal, state, and local laws with reference to the sale of a firearm at Academy Sports & Outdoors, the buck stops with you, correct?

A. That is not correct. So I'm in charge of compliance, but I also partner with outside counsel that are -- specialize in firearm compliance laws. We also have internal counsel, a general counsel, that helps with decision-making as well.

Q. But as far as corporate employees, does the buck stop with you when it comes to compliance?

A. As I said before, they can come to me for compliance questions, but I also partner with outside

Q. BY MR. LEGRAND: Okay. Go ahead. I'm sorry, [redacted].

A. Can you repeat the question, please?

Q. That's what I thought.

Okay. [redacted], can you tell me, because apparently you've talked to [redacted], correct, about this issue?

MS. MILITELLO: Objection, form.

Q. BY MR. LEGRAND: And my question is very specific. You understand the model 8500, okay, in its box is accompanied with a 30-round magazine, correct?

A. Yes, I understand that is the case.

Q. So I'm specifically right now talking about a model 8500 AR-556, not any other AR-556; fair enough?

A. That is fair, yes.

Q. Okay. Have you talked to [redacted] about whether or not it's legal to sell a model 8500 AR-556 with its accompanying 30-round magazine over the counter in the state of Colorado?

A. Yes, I have talked to him about it.

Q. Is it legal to do that?

A. We do not sell -- Academy Sports & Outdoors -- does not sell that 8500 over the counter in the state of Colorado.

Q. No, no. That was not my question. That's why

THE WITNESS: I agree that Academy sold Devin Kelley an 8500 AR-556 in the state of Texas --

Q. BY MR. LEGRAND: Yes, sir.

A. -- yes, legally to Devin Kelley.

Q. Object to the responsiveness.

My question was, is it undisputed that Academy sold Devin Kelley a model 8500 AR-556?

I'm doing this one step at a time. I just want an answer to that question. Is the answer yes?

A. I believe that I answered your question that Academy sold the model 8500 in the state of Texas to Devin Kelley legally.

Q. And legally in the state of Texas?

A. Legally in the state of Texas, yes, sir.

Q. Now, that model 8500 that Academy sold to Devin Kelley, did it come in a box?

A. Yes. The model 8500 that Academy sold to Devin Kelley came inside a box, that is correct.

Q. Did it also come with an instruction manual?

A. To my knowledge, yes, it came with an instruction manual.

Q. It's required to, isn't it, under your training documents?

A. It's required to sell a firearm with an instruction manual.

into the firearm, that is correct.

Q. BY MR. LEGRAND: So the firearm is not a semiautomatic weapon without the magazine inserted, correct?

A. That is not correct.

Q. Well, it's a semiautomatic weapon; that's what you're saying, correct?

A. That's not what I'm saying.

Q. What are you saying?

A. I am saying it's advertised as a semiautomatic firearm, yes. It can be --

Q. Let's stick to function --

MS. MILITELLO: Let him finish his --

Q. BY MR. LEGRAND: Can it function as advertised?

MS. MILITELLO: Mr. LeGrand, no, he was partway through --

Q. BY MR. LEGRAND: Did I interrupt you, [redacted]?

A. Yes, you did.

Q. I apologize. Go ahead.

A. So it can function as a single-shot rifle, as you're aware, and it can function as a semiautomatic rifle, that is correct.

Q. Can it function as a semiautomatic rifle without the magazine?

A. Without the magazine it cannot, that is correct.

Q. So going by the instruction manual, do you agree with Exhibit 9 -- which is a page from the instruction manual, the Ruger instruction manual, correct, that we were looking at a minute ago?

A. Yes, that is correct.

Q. Do you agree with Ruger that the AR-556, whether it has a 5, 10, or 30-round magazine, cannot function as a semiautomatic firearm unless it has one of those magazines installed, correct?

A. So a semiautomatic weapon has the autoload and then auto dispense the cartridge, that is correct.

Q. Have you looked at Exhibit 10?

A. Can you show me Exhibit 10.

So I saw it the day of the deposition, but I have not looked at it in detail, that is correct.

Can I look at it in detail right now?

Q. Sure.

And, [redacted], before I get to that, let me do a bit of housekeeping right quick.

What's been marked as Exhibits 12 and 13 I'm going to hand you, have you seen those before? They're notices for your deposition to be here today.

Q. BY MR. LEGRAND: I'm asking you, according to Academy rules, and you're their compliance officer, is Academy allowed to open the Ruger box and change the consist?

MS. MILITELLO: Objection, form.

I don't know what a consist is.

MR. LEGRAND: What comes in the box.

MS. MILITELLO: Contents?

MR. LEGRAND: Contents.

Q. BY MR. LEGRAND: What consists of the contents of the box?

MS. MILITELLO: Objection, form.

MR. LEGRAND: I apologize, Ms. Militello. I do too many railroad accidents and things of that nature, and they always talk about consist.

MS. MILITELLO: I just wanted to make sure --

Q. BY MR. LEGRAND: Do you understand the word consist, [redacted]?

A. I did not understand the word consist.

Q. BY MR. LEGRAND: Let's do contents then.

Based on Academy's rules and what you go by, do you authorize your Academy stores to alter or change the contents of the box from Ruger?

MS. MILITELLO: Objection, form.

THE WITNESS: According to Academy procedures,

we do not allow the stores to change the contents of the firearm in the box.

Q. BY MR. LEGRAND: And the only way Ruger boxes a model 8500 is equipped with a 30-round magazine, correct?

A. So I don't know all of Ruger's --

Q. I just asked about the 8500, [redacted].

As far as you know --

A. For the firearms that we receive from Ruger --

Q. Yes.

A. -- for Academy only, from Ruger, yes, it comes with the 30-round magazine.

Q. If you look at Exhibit 10 --

A. Yes.

Q. -- Exhibit 10 says the model 8500 comes with and is equipped with a 30-round magazine, correct?

A. First, we needed a break so I can review the form.

Q. I'm just asking about this before we take that break.

Does it say that on that form?

A. Can I have the break first, before --

Q. Just answer this question and then we'll take the break.

A. Okay. So ask the question one more time.

Q. On Exhibit 10, does it say from Ruger -- you agree that comes from Ruger's website, Exhibit 10?

MS. MILITELLO: Objection, form.

THE WITNESS: Yes, I saw the -- from what you presented at the deposition a few days ago.

Q. BY MR. LEGRAND: So you have no dispute that Exhibit 10 comes from Ruger's website, correct?

MS. MILITELLO: Objection, form.

THE WITNESS: As I said before, they're not disputing it came from the website, that is correct.

Q. BY MR. LEGRAND: Very good.

And column number 1 is the model 8500, correct?

A. That is the Ruger model, yes.

Q. And column number 1 is what you sold Devin Kelley, correct?

A. We sold, yes, AR-556 to Devin Kelley.

Q. And when Devin Kelley walked out of your store, he walked out after the purchase with a model 8500 equipped with a 30-round magazine, correct?

MS. MILITELLO: Objection, form.

THE WITNESS: He purchased a ATF model AR-556 and the Ruger model 8500. There's a difference.

Q. BY MR. LEGRAND: Equipped with a 30-round magazine, correct?

MR. WEBSTER: Sorry.

MR. LEGRAND: No problem, we'll get it figured out.

Q. BY MR. LEGRAND: Can you see that clearly, [redacted]?

A. Yes, I can see it right now.

Q. Is that what Mr. Kelley purchased at Academy the day he came in there on April the 7th, 2016?

A. In comparing the SKU numbers, and if that is Mr. Kelly's receipt, yes, he did purchase that.

Q. So he bought a Ruger AR-556 that is SKU number 103530047, correct?

A. Yes, that is correct.

Q. Now, if we look at your website for that same SKU number, that would be Exhibit 6, correct?

A. Yes, this is the firearm that he purchased from Academy Sports & Outdoors in Texas, that is correct.

Q. So is Exhibit 6, that shows a picture of the firearm and has various pages, that is the firearm Devin Kelley purchased from Academy?

A. Yes, this is the firearm that he purchased from the Texas store legally at Academy Sports & Outdoors.

Q. Does that appear to be an accurate copy of

to dispute that Colorado had its magazine restriction at the time Devin Kelley purchased his 8500 from you?

MS. MILITELLO: Objection, form.

THE WITNESS: I have no reason to dispute it, that is correct.

Q. BY MR. LEGRAND: Okay, very good.

Now, looking back -- is it Exhibit 2 that you're looking at?

A. Exhibit 3.

Q. Three. Okay, Exhibit 3 is this magazine.

Now, first of all, you agree it shows you can't ship that magazine to Colorado, correct?

A. Yes, I agree.

Q. And that's because you don't want to break the law, right?

MS. MILITELLO: Objection, form.

THE WITNESS: It's because we want to sell magazines legally, that's correct.

Q. BY MR. LEGRAND: And you knew Devin Kelley was from Colorado, correct?

A. In reviewing the 4473?

Q. Yes.

A. He placed a Colorado Springs address on the 4473.

Q. So when he came in that day, there's no

Q. BY MR. LEGRAND: Sir, is this limited to online sales?

MR. WEBSTER: Objection, sidebar.

THE WITNESS: Yes, this is limited to online sales.

Q. BY MR. LEGRAND: Does it say it's limited to online sales?

A. When you read it in its totality, yes, it connects the restrictions along with the language you read.

Q. But the bottom line is, bottom line is you sold Mr. Kelley something over the counter that -- when you knew he was from Colorado, correct?

A. We sold the firearm, yes, to him.

Q. And you also sold him a magazine over-the-counter, a 30-round magazine, correct?

A. He purchased a magazine in the aisle --

Q. In Texas?

A. Yes, in Texas legally. That is correct.

Q. But you knew he was from Colorado, right?

A. At the time of the sale, yes.

Q. So would you agree it was foreseeable that he would go home?

MS. MILITELLO: Objection, form.

Q. BY MR. LEGRAND: You can answer.

A. I was not there at the time of the sale.

Q. Well, as we sit here today, do you think Devin Kelley gave Academy a fictitious address?

A. I think he gave the address that was provided on his ID, yes.

Q. Now, this magazine that you sold him right here, this 30-round magazine, Exhibit 3?

A. Yes.

Q. If he went home, he'd be breaking Colorado law the minute his foot touched the ground, correct --

MS. MILITELLO: Objection, form.

MR. LEGRAND: -- with that magazine?

THE WITNESS: In relation to the magazine?

Q. BY MR. LEGRAND: Yeah, it's illegal for him to possess that magazine in Colorado, correct?

MS. MILITELLO: Objection, form, incomplete hypothetical.

THE WITNESS: So with the firearm, he can bring it back to Colorado, yes. A 30-round magazine, he cannot purchase that in the state of Colorado.

Q. BY MR. LEGRAND: And he can't possess it in the state of Colorado either; can he?

A. He cannot possess that magazine in the state of Colorado, that is correct.

Q. And he can't possess the extra magazines you

sold him in the state of Colorado; can he?

A. He cannot --

MS. MILITELLO: Objection, form.

THE WITNESS: He cannot bring that fire -- or that magazine back to the state of Colorado, that's correct.

Q. BY MR. LEGRAND: So if he -- so you knew or Academy knew that if he went home with the items that you sold him, that he'd be breaking the law?

MS. MILITELLO: Objection, form.

THE WITNESS: We didn't know if he was going back home or if he left the firearm in the state of Texas.

Q. BY MR. LEGRAND: No, sir, listen carefully to my question.

A. Yes, sir.

Q. Would you agree Academy knew that if Mr. Kelley went home with the rifle you sold him, with the magazine you sold him, and with the magazine that came with the rifle, that he would be violating the law of Colorado? You knew that, correct?

MS. MILITELLO: Objection, form.

THE WITNESS: So it's three different questions. If he took the firearm back home to Colorado, he would not be violating the law.

A. Go ahead and open it.

Q. Sir?

A. Go ahead and open it.

Q. You can open -- first, look on the end of the box, what does it say?

A. Shows the serial number and the Ruger model number.

Q. 8500?

A. It does say 08500.

Q. Very good.

And would you open the box and see if it's a -- you can confirm it's a model 8500?

A. It says AR-556. That is the ATF model.

Q. And are you aware that the reason it gets the designation 8500 versus 8511 is because of the size of the magazine?

A. I'm not familiar with Ruger's nomenclature.

Q. Isn't that what Exhibit 10 seems to show, is that the size of the magazine is what affects the model number?

For example, if we look at an 8511, it has a 10-round magazine -- like the 10-round magazine we showed on Exhibit 4, correct?

A. Yes.

Q. -- and that's why -- that's -- it's an 8511,

firearm to inventory unless it comes through compliance first, correct?

MS. MILITELLO: Objection, form.

THE WITNESS: So we add a firearm --

Q. BY MR. LEGRAND: Yes.

A. -- comes through compliance --

Q. Yes.

A. -- and we also follow up with ATF in making sure that it's compliant to sell.

Q. And did you do that with the 8511?

A. We do that with our firearms.

Q. When did you start selling the 8511?

MS. MILITELLO: Objection, form.

THE WITNESS: As far as I know, 2017. The month, I cannot give you the exact date.

Q. BY MR. LEGRAND: Do you know if your starting to sell the 8511 had anything to do with the shooting in Sutherland Springs?

A. Can you rephrase that question?

Q. Did your startup on marketing the 8511, which according to Ruger is a state compliant model, correct?

MS. MILITELLO: Objection, form.

THE WITNESS: According to this, yes. It's state compliant with all states it sells.

Q. BY MR. LEGRAND: And it's state compliant with

Colorado and Maryland, correct, according to Exhibit 10?

MS. MILITELLO: Objection, form.

THE WITNESS: The 8511?

Q. BY MR. LEGRAND: Yes.

A. In reading -- "The model is legal for sale in the following otherwise restricted locations: Colorado and Maryland," that's what it says.

Q. So Academy started some time in 2017, selling a model of the AR-556 that was state compliant for Colorado and Maryland, and I want to know why.

MS. MILITELLO: Objection, form.

THE WITNESS: We sell a variety of firearms, thousands.

Q. BY MR. LEGRAND: So there's no specific reason that all of a sudden you started selling, in addition to the 8500, a model that was compliant for Colorado?

MS. MILITELLO: Objection, form.

THE WITNESS: That question is -- I'm not the marketing guy. I don't make the decisions on what models we bring into Academy. That is a buyer.

Q. BY MR. LEGRAND: So was the model 8511 -- that's the state compliant model, you agree with that, correct?

A. According to Ruger's paper right here, yes.

Q. For Colorado.

magazine, but there's also a space for another that's not included in the box. So these may come or may not come with it.

Q. But the 8500 comes with a 30-round magazine from the factory, correct?

MS. MILITELLO: Objection, form.

THE WITNESS: This 8500, yes, that is correct.

Q. BY MR. LEGRAND: And the 8500 that Academy sells comes from the factory with a 30-round magazine, correct?

A. We receive this particular firearm from a distributor, that is correct.

Q. And it comes with a 30-round magazine?

A. There's a 30-round magazine inside the box, that is correct.

Q. If a Devin Kelley or someone like Devin Kelley walked into -- was the firearm sold to Devin Kelley at store 41?

A. Yes, Devin Kelley purchased the firearm legally in store 41 in Texas.

Q. And if a person from Colorado walked into store 41 today and presented a Colorado driver's license, would Academy sell them a model 8500?

A. If the --

MS. MILITELLO: Objection, form.

THE WITNESS: If the customer was not from Denver, Colorado, he can purchase the AR-556 from Academy Sports & Outdoors legally in Texas.

Q. BY MR. LEGRAND: So the map has not changed?

A. Since?

Q. Since Devin Kelley purchased his AR-556.

A. Do you have the maps that I can see?

Q. I'm just asking you if you know. You're the head of compliance. Has the map changed since April of 2016?

MS. MILITELLO: Objection, form.

THE WITNESS: The map will change as state or federal law changes, yes, that is correct.

Q. BY MR. LEGRAND: Has it changed with reference to Colorado since 2016?

A. There is no changes. ATF, FBI, Texas Rangers all reviewed the laws of the 4473 and the sale, and there are no mistakes.

Q. Has Academy changed their map with reference to who they will sell firearms to from other states because of any magazine restriction laws, to your knowledge?

A. No, sir, no changes were made.

Q. Okay. So if somebody walked in from Colorado today and wanted to buy an AR-556 that came equipped

Q. Do you understand, [redacted], that when you sell a firearm to a citizen of another state, that you have to comply with the firearm laws of that person's state?

A. The reciprocity law, yes, I am familiar with it.

Q. So if the Ruger AR-556 model 8500 cannot be sold in Colorado legally, can you sell it to a Colorado citizen legally?

MS. MILITELLO: Objection, form, incomplete hypothetical. Sell it in Texas, is that the question?

THE WITNESS: The model AR-556, the firearm itself, yes, you can sell it in the state of Texas and in Colorado.

Q. BY MR. LEGRAND: Can you sell it with its magazine in Colorado?

A. The AR-556 with the 30-round magazine in Colorado. If you're a citizen, a Colorado -- sorry -- Colorado resident, you cannot purchase the AR-556.

Q. With a 30-round magazine?

A. In the state of Colorado.

Q. And do you know whether Academy has to comply with that same Colorado law if they sell a firearm to a Colorado resident?

MS. MILITELLO: Objection, form, incomplete hypothetical, misleading.

THE WITNESS: Excluding Denver residents?

Q. BY MR. LEGRAND: Yeah, sure, that's fine.

A. Okay. So Academy has to comply with the firearm laws in the state of Texas in Colorado. ATF has reviewed the sale and they found it was legal. That means ATF -- local ATF headquarters, counsel, FBI, Texas Rangers all reviewed the sale and determined it was a legal sale.

Q. When?

A. When? Now. We're sitting here right now.

Q. Do you have a report from all of those agencies saying that the sale you made to Devin Kelley was a legal sale?

A. I've had conversations with agencies, yes, that it was a legal sale.

Q. Who have you had conversations with that told you that it was a legal sale?

A. With the ATF.

Q. Do you understand that federal law requires you to fully comply with the sale, delivery, and receipt of the firearm that is sold with the law of Colorado if you're selling to a Colorado resident?

MS. MILITELLO: Objection, form.

Q. BY MR. LEGRAND: Do you agree with that?

A. I agree that, yes, we have to comply.

Have I read that correctly?

A. Yes.

Q. So if you look back at group number one, if you have a bolt action with a detachable magazine, that detachable magazine, according to the ATF on this document is a component part of that bolt action rifle, correct?

MS. MILITELLO: Objection, form.

Q. BY MR. LEGRAND: According to what I just read.

MS. MILITELLO: Objection, form.

Q. BY MR. LEGRAND: Do you see what I'm saying, [redacted]?

A. I see what it says on --

MS. MILITELLO: Objection, form.

Q. BY MR. LEGRAND: It says it's a component part, doesn't it?

MS. MILITELLO: Objection, form.

Q. BY MR. LEGRAND: Detachable magazines in group one, and it says, "group callouts identify component parts of this firearm."

MS. MILITELLO: Objection, form.

THE WITNESS: That's what this says.

Q. BY MR. LEGRAND: That's what this says, right?

MS. MILITELLO: Objection, form.

"Shall not apply to the sale or" -- A is, "shall not apply to the sale or delivery of any rifle or shotgun to a resident of a state other than a state in which the licensee's place of business is located."

So that would be you and Devin Kelley; wouldn't it? Devin Kelley walked into your store. He was from another state. So this fits, correct, what I'm reading here?

MS. MILITELLO: Objection, form.

Q. BY MR. LEGRAND: This fits that situation; does it not?

A. You have to read the entire --

Q. I'm going to.

A. You have to read it. I can not give you a correct answer then.

Q. "Where the transferee," that would be Devin Kelley, correct?

A. Devin Kelley is a transferee.

Q. "Meets in person with the transferor"; he did that in your store, correct?

A. He came into the Academy yes, in Texas.

Q. "To accomplish the transfer," and he did that, correct?

A. To transfer firearms, yes.

Q. And then it says, "And the sale, delivery, and

receipt fully comply with the legal conditions of sale in both such states."

In other words, Colorado and Texas, correct?

A. That's what it shows right there, yes.

Q. And this says you can sell a rifle or a shotgun to Devin Kelley as long as the transfer and the sale, delivery, and receipt fully comply with the legal conditions of sale in both states. Have I read that correctly?

A. You read that part correctly, yes.

Q. And then it says parenthesis, and it says, "(and any licensed manufacturer, importer, or dealer shall be presumed, for purposes of this subparagraph and the absence of evidence to the contrary, to have had actual knowledge of the state laws and published ordinances of both states.)"

Have I read that correctly?

A. Yes, that's what it says right there.

Q. Does that mean to you that when Devin Kelley walked in and gave your store a Colorado driver's license and said, "I want to buy a firearm from you," that Academy, if they're going to sell Devin Kelley a firearm, Academy is presumed to know the laws of both Texas and Colorado, correct?

A. Yes, that's what it says.

Q. That's what it says; isn't it?
A. Yes.
Q. And let's go back up here to where it says, "Devin Kelley has to meet with the transferor in person to accomplish the transfer." Do you see that?
A. Yes, and that's what he did.
Q. But right here is what I want to talk to you about, "The sale, delivery, and receipt fully comply with the legal conditions of sale in both such states."
A. Yes.
Q. Now, you've already told me today that if Devin Kelley was in Colorado and an FFL handed him an 8500 with a 30-round magazine, that would not fully comply with Colorado law; would it?
A. Yes, we made that statement.
Q. You agree with that?
A. I agree we made that statement.
Q. So would you agree that 18 U.S.C. 922 b(3) says that if you're going to sell to Devin Kelley, you have to behave as if you were in Colorado, because the sale has to fully comply with the legal conditions of sale in both states?
MS. MILITELLO: Objection, misstates the law.
Q. BY MR. LEGRAND: Correct?
A. Colorado allows you to buy a rifle outside of

MS. MILITELLO: That doesn't make it a different question.

MR. LEGRAND: You're not supposed to make these kinds of objections.

MS. MILITELLO: I'm saying, objection, asked and answered. I can make that one.

MR. LEGRAND: No, you can't.

MS. MILITELLO: Yes, I can.

MR. LEGRAND: That's not in the rules.

MS. MILITELLO: Nor is it in the rules to do what you're doing either.

Q. BY MR. LEGRAND: Would you agree, [redacted] all day long -- I'm just trying to get done, okay.

Would you agree that all day long that you've agreed that Colorado won't let Mr. Kelley purchase from an FFL in Colorado the AR-556 with a 30-round magazine?

A. Yes, I agree that in the state of Colorado, from a Colorado FFL, Mr. Kelley cannot purchase a AR-556 with a 30-round magazine in the state of Colorado, yes.

Q. And you agree that if Academy shipped it to a dealer in Colorado, Academy would be breaking the law by sending the 30-round magazine to Colorado, correct?

MS. MILITELLO: Objection, form.

Q. BY MR. LEGRAND: You agree with that, correct?

A. If we sent the magazine to Colorado, yes.

Q. In other words, if you shipped the AR-556 model 8500 in a box with a 30-round magazine in the same box, you'd violate Colorado law; wouldn't you?

MS. MILITELLO: Objection, form.

THE WITNESS: If we shipped -- against our policy -- if we shipped the firearm with the 30-round magazine, would be violating Colorado law, yes.

Q. BY MR. LEGRAND: Now, the -- you know what I'm referring to when I refer to the Academy Interstate Long Gun Purchase Map?

A. Yes, I am familiar with it.

Q. Do you know why the documents that I've been provided in some cases say that it's not proper for you guys to sell in the state of Alaska?

A. Some versus --

Q. Do you know why --

A. That's an incomplete statement.

Q. Okay. I'll show you. I'm sorry.

MS. MILITELLO: Do you really want to know, or are we just screwing around with the witness?

Different versions. George said different versions. I don't know if you really are trying to find out --

MR. LEGRAND: Ma'am, do you realize you're breaking the rules?

Alaska law that causes that?

A. I don't know it offhand, no, sir.

Q. Who does this map that we're looking at that's page 132?

MS. MILITELLO: Objection, form.

THE WITNESS: I worked with outside counsel on this map.

Q. BY MR. LEGRAND: Okay.

MR. WEBSTER: [redacted]

Q. BY MR. LEGRAND: So does [redacted] prepare this map?

A. Yes. I prepared it in conjunction with [redacted]

Q. So who prepares it, [redacted] or you?

A. We prepare it together.

Q. You work on it together, you send it back and forth?

A. Yes, we do.

Q. And how often do you do that?

A. Any time there's an update in federal or state law.

Q. And so when Colorado passed its magazine restriction law in 2013, did you update the map?

A. No. This refers to long guns and MSRs, not magazines; restrictions on the firearms.

MS. MILITELLO: Objection, form.

THE WITNESS: He purchased the firearm from Academy Sports & Outdoors legally.

Q. BY MR. LEGRAND: Now, let's just talk about the firearm, okay?

A. Not the magazine.

Q. Let's talk about the firearm. Read the details and specs of the firearm to me.

A. "The Ruger AR-556 5.56 semiautomatic rifle is a semiautomatic rifle with a 30-round capacity that features a cold hammer-forged, medium contour, one and a half inch - 28 threaded barrel with a matte, corrosion-resistant, Type III hard-coat anodized finish, a 6-position telescoping M4-style buttstock with a MIL-SPEC buffer tube and an ergonomic pistol grip with heat-resistant, glass-filled with nylon handguards. Includes a 30-round Magpul magazine."

Q. Includes, correct?

A. Includes in the box, yes.

Q. And the firearm is described on your website in Exhibit 6, that I just read -- or you just read, actually -- the firearm, the firearm by itself, according to your website, is a semiautomatic rifle with a 30-round capacity, correct; isn't that what your website says?

Q. BY MR. CRAWFORD: So Academy has a duty to know what the laws are in every state in the union; is that fair?

MS. MILITELLO: Objection, form.

THE WITNESS: Academy needs to know the laws, yes, that's correct.

Q. BY MR. CRAWFORD: Academy needs to keep up with the laws, correct?

A. Yes, Academy needs to keep up with all the laws.

Q. And the legislatures of every state are constantly enacting new laws all the time, every year; is that right?

A. New laws are enacted, all kind of laws, yes.

Q. So that means you guys need to be, I mean, diligent in staying on top of all those different laws in all the states, correct?

MS. MILITELLO: Objection, form.

THE WITNESS: Diligence is -- yes, it's part of my job, yes.

Q. BY MR. CRAWFORD: Not only in the states, but also in cities, right?

MS. MILITELLO: Objection, form.

THE WITNESS: States and cities, yes, that is correct.

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF R.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR;	)	IN THE DISTRICT COURT
Plaintiffs,	)	
vs.	)	
ACADEMY, LTD D/B/A ACADEMY SPORTS + OUTDOORS,	)	
Defendants.	)	224TH JUDICIAL DISTRICT

REPORTER'S CERTIFICATION
VIDEOTAPED AND ORAL DEPOSITION OF
[redacted]
November 9, 2018

I, LISA A. BLANKS, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, [redacted] was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on 11-30-18 to the witness or to the attorney for the witness for examination, signature and return to me by 12-30-18;

That the amount of time used by each party at the deposition is as follows:

George LeGrand - 3 hours, 48 minutes
Jason Webster - 19 minutes
Kelly Kelly - 8 minutes
Marco Crawford - 37 minutes
Janet Militello - 10 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for parties of record:

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For the Plaintiffs Chris Ward, individually and as next friend of Ryland Ward and for the estates of Joann Ward and Brooke Ward:

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I further certify that I am not related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further, that I am not financially or otherwise interested in the outcome of the action.

Further certification requirements pursuant to Rule 203 of TRCP will be certified to after they have occurred.

Certified to by me this 11th day of November, 2018.

LISA A. BLANKS, RPR, CRR, CSR
Certification Number: 4266
Certification Expiration 12/31/18
Firm No. 10766
Paszkiewicz Court Reporting
39 Executive Plaza Court
Maryville, IL 62062

FURTHER CERTIFICATION UNDER RULE 203 TRCP

The ~~original deposition~~/signature page was/was not returned to the deposition officer on 12-20-18;

If returned, the attached Changes and Signature page contains any changes and the reasons therefor;

If returned, the original deposition was delivered to N/A, Custodial Attorney;

That $3944.80 is the deposition officer's charges to the Plaintiff for preparing the original deposition transcript and any copies of exhibits;

That the deposition was delivered in accordance with Rule 203.3, and that a copy of this certificate was served on all parties shown herein on 1-21-19 and filed with the Clerk.

Certified to by me this 21 day of January, 2019.

Lisa A. Blanks

LISA A. BLANKS, RPR, CRR, CSR
Certification Number: 4266
Certification Expiration 12/31/18
Firm No. 10766
Paszkiewicz Court Reporting
39 Executive Plaza Court
Maryville, IL 62062

I, [redacted], have read the foregoing deposition and hereby affix my signature that same is true and correct, except as noted above.

[redacted]

THE STATE OF Texas)
COUNTY OF Harris)

Before me, Renee Perez, on the day personally appeared [redacted], known to me (or proved to me under oath or through _____) (description of identity card or other document), to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 29th day of November, 2018.

RENEE Y. PEREZ
Notary Public, State of Texas
Comm. Expires 11-18-2019
Notary ID 124717672

NOTARY PUBLIC IN AND FOR THE STATE OF Texas
MY COMMISSION EXPIRES:
11/18/2019

CHANGES AND SIGNATURE

WITNESS NAME: [redacted]

DATE OF DEPOSITION: NOVEMBER 9, 2018

PAGE	LINE	CHANGE	REASON
11	1	Change "I'll receive" to "I oversee"	Misquoted
38	23	Change "can't" to "can"	Misquoted
43	1-2	Change "firearm in the box" to "firearm's box"	Clarification
46	15	Add "with a 30-round magazine" after "AR-556"	Clarification
83	14	Add "is" after "cares about"	Misquoted
108	18	Add "with a 30-round magazine" after "AR-556"	Clarification
118	15-16	Add "residents" after the first "Colorado;" add "a" before second "Colorado;" add "resident" after second "Colorado;" and delete "to" before "outside"	Clarification
180	14	Add "the 30-round magazine" after "purchase"	Clarification
183	20	Add "30-round" before magazine	Clarification
186	4	Add "with a 30-round magazine" after AR-556	Clarification
252	14	Change "sale" to "incident"	Clarification
280	13	Change "can't" to "can"	Misquoted
290	10	Change "State" to "store"	Misquoted

*CONTAINS SENSITIVE DATA

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF R.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR;	) IN THE DISTRICT COURT
Plaintiffs,	)
vs.	)
ACADEMY, LTD D/B/A ACADEMY SPORTS + OUTDOORS,	)
Defendants.	) 224TH JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION

[redacted]

NOVEMBER 13, 2018

ORAL and VIDEOTAPED DEPOSITION OF [redacted], produced as a witness at the instance of certain Plaintiffs, and duly sworn, was taken in the above-styled and numbered cause on November 13, 2018, from 1:05 p.m. to 4:03 p.m., before LISA A. BLANKS, CSR, in and for the State of Texas, reported by machine shorthand, at Norton Rose Fulbright US LLP, 300 Convent Street, Suite 2100, San Antonio, Texas, 78205, pursuant to the Texas Rules of Civil Procedure and the provisions stated on the record.

EXHIBIT 2 MR 277

THE WITNESS: Well, we'll never know, because it's not; it's an accessory part. There's many different size magazines that can come with these. However, this one comes with a 30-round.

Q. BY MR. LeGRAND: What if Colorado had a law against flash suppressors, could you sell the 8500 to a person from Colorado?

MS. MILITELLO: Objection, form.

THE WITNESS: No.

Q. BY MR. LeGRAND: No, and that's because the flash suppressor's part of the firearm, correct?

A. Correct.

MS. MILITELLO: Objection, form.

Q. BY MR. LeGRAND: Now, Mr. [redacted], you were with Mr. Kelley when he prepared -- in fact, you signed the model 4473 that's Exhibit 5, correct?

A. 4473?

Q. Yes. That's in front of you right there.

A. Yes.

Q. Exhibit 5.

A. Right.

Q. Is that Mr. Kelley's handwriting up at the top?

A. I would have to assume so.

Q. Did you fill this out for him?

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF R.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR;	) IN THE DISTRICT COURT
Plaintiffs,	)
vs.	)
ACADEMY, LTD D/B/A ACADEMY SPORTS + OUTDOORS,	)
Defendants.	) 224TH JUDICIAL DISTRICT

REPORTER'S CERTIFICATION
VIDEOTAPED AND ORAL DEPOSITION OF
[redacted]
November 13, 2018

I, LISA A. BLANKS, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, [redacted] was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on _____ to the witness or to the attorney for the witness for examination, signature and return to me by _____;

That the amount of time used by each party at the deposition is as follows:

George LeGrand - 1 hours, 32 minutes
Jason Webster - 19 minutes
Marco Crawford - 19 minutes
Justin DeMerath - 36 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for parties of record:

For the Plaintiffs Rosanne Solis and Joaquin Ramirez:

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For the Plaintiffs Chris Ward, individually and as next friend of Ryland Ward and for the estates of Joann Ward and Brooke Ward:

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LOCKE LORD LLP
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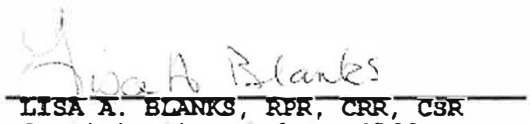
713.226.1208
jmilitello@lockelord.com

I further certify that I am not related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further, that I am not financially or otherwise interested in the outcome of the action.

Further certification requirements pursuant to Rule 203 of TRCP will be certified to after they have occurred.

Certified to by me this 14th day of November, 2018.



LISA A. BLANKS, RPR, CRR, CSR
Certification Number: 4266
Certification Expiration 12/31/18
Firm No. 10766
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39 Executive Plaza Court
Maryville, IL 62062

*CONTAINS SENSITIVE DATA

Academy SPORTS+OUTDOORS

FREE SHIPPING ON MOST ORDERS OVER $25 & FREE RETURNS See Details >

< Semi-Automatic Rifles

SHIPS TO STORE

Ruger AR-556 5.56 Semiautomatic Rifle

★★★★½ 4.5 (31)

$649.99

Gauge/Caliber: 5.56X45 Nato

EXHIBIT 3 tabbies

Quantity:

MR 283

ADD TO CART

Add to Wish List

Special Order Ships to Store
Kirby ⓘ
Est. Arrival Jan 28 - Jan 29
Change Location

Not Sold in Stores

All firearm purchases require valid U.S. government issued ID and related firearm paperwork. You must pass a criminal background check for all firearm purchases. Age and residency restrictions apply. You must meet all other requirements as set forth by applicable Federal, state and local statutes, rules and regulations for firearm purchase. Other terms and conditions may apply. Academy Sports + Outdoors reserves the right to refuse the sale of firearms to anyone for any reason. It is your responsibility to ensure that you are in compliance with all applicable laws, rules and regulations for the purchase of firearms. Please note a 10% restocking fee will be charged if your item is not picked up. A fee would not apply if your item is incorrect, damaged, or a failed background check occurs.

See less

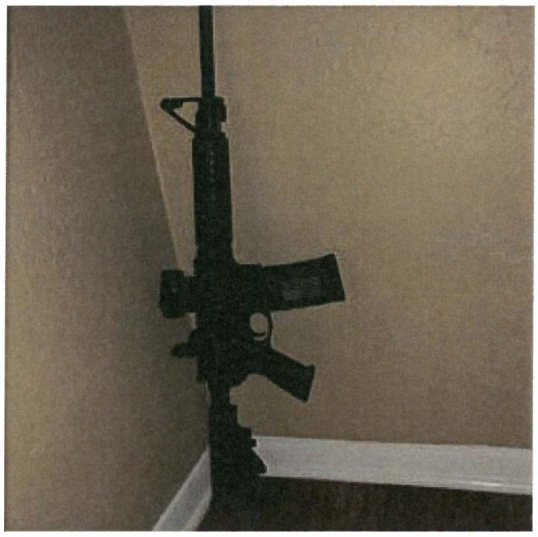
SKU:103530047
ITEM: 8500

DETAILS & SPECS

MR 284

Q&A +

Customer Photos #MyAcademyPhoto

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THIS IS ACADEMY +

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SERVICES +

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MR 285

MR 286

SKU:103530047 **ITEM:**8500

DETAILS & SPECS REVIEWS Q&A

The Ruger AR-556 5.56 Semiautomatic Rifle is a semiautomatic rifle with a 30-round capacity that features a cold hammer-forged, medium contour, 1/2" - 28 threaded barrel with a matte, corrosion-resistant, Type III hard-coat anodized finish, a 6-position telescoping M4-style buttstock with a MIL-SPEC buffer tube and an ergonomic pistol grip with heat-resistant, glass-filled nylon handguards. Includes a 30-round Magpul® PMAG® magazine.

Features and Benefits

- Semiautomatic action with a 30-round capacity
- 16.1", cold hammer-forged, medium contour, 1/2" - 28 threaded barrel with a matte, corrosion-resistant, Type III hard-coat anodized finish
- 5.56 NATO chamber allows the use of both 5.56 NATO and .223 Remington ammunition
- 6-position telescoping M4-style buttstock with a MIL-SPEC buffer tube
- Ergonomic pistol grip with an extended trigger reach
- Heat-resistant, glass-filled nylon handguards
- Enlarged trigger guard for gloved shooting
- Elevation-adjustable, front post sight with a front sight tool
- Ruger® Rapid Deploy folding rear sight provides windage adjustability
- Ruger® flash suppressor
- Milled gas block with serrations on the angled face
- Multiple attachment points, including a QD socket and a bayonet lug, for sling and accessory mounting options (accessories sold separately)
- Includes a 30-round Magpul® PMAG® magazine

Specifications

- Handedness: Ambidextrous
- Rate of twist: 1 in. 8 in. RH
- Product weight: 6.5 lb.
- Type: Centerfire
- Metal finish: Type III hard-coat anodized
- Style: Target
- Magazine capacity: 30
- Rear sight: Adjustable Ruger® Rapid Deploy
- Stock: Synthetic
- Barrel length (in.): 16.1
- Action: Semiautomatic
- Front sight: Adjustable post
- Caliber: 5.56 NATO
- Product length (in.): 35.5

What's in the Box

- Ruger AR-556 5.56 Semiautomatic Rifle
- 30-round Magpul® PMAG® magazine
- Front sight tool

Important Product and Safety Information

- We recommend the use of protective eyewear whenever using or near the use of this item.
- Please note that all firearm purchases require valid US government issued ID and related firearm paperwork.
- Firearms purchased online are shipped to your local Academy Sports + Outdoors as selected in the checkout process.

MR 287

*CONTAINS SENSITIVE DATA

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF R.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR;	) IN THE DISTRICT COURT
Plaintiffs,	)
vs.	)
ACADEMY, LTD D/B/A ACADEMY SPORTS + OUTDOORS,	)
Defendants.	) 224TH JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION

[redacted]

NOVEMBER 7, 2018

ORAL and VIDEOTAPED DEPOSITION OF [redacted], produced as a witness at the instance of certain Plaintiffs, and duly sworn, was taken in the above-styled and numbered cause on November 7, 2018, from 2:06 p.m. to 6:26 p.m., before LISA A. BLANKS, CSR, in and for the State of Texas, reported by machine shorthand, at Norton Rose Fulbright US LLP, 300 Convent Street, Suite 2100, San Antonio, Texas, 78205, pursuant to the Texas Rules of Civil Procedure and the provisions stated on the record.

EXHIBIT 4

MR 288

A. My name is [redacted]

Q. Is it okay if I call you [redacted]?

A. Yes, sir.

Q. Or Mr. [redacted]; which do you prefer?

A. [redacted]'s fine.

Q. Mr. [redacted], do you know why you're here today?

A. Yes, I do.

Q. And what is your understanding in that regard?

A. We're here for the selling of a firearm to Devin Kelley.

Q. And were you involved in that sale?

A. Yes. I was the final write-off for the legal sale to Devin Kelley on that.

Q. So without your final write-off, the sale would not have taken place?

A. Yes, sir.

Q. Is the sale we're talking about the sale of a Ruger AR-556?

A. Yes, we sold Devin Kelley a Ruger AR-556.

Q. What model?

A. It was a 556.

Q. I know it was an AR-556, but what model was it?

A. The Ruger. It was a Ruger AR-556 MSR.

Q. Do you understand that there are several

Q. And do you know how it was configured?
MS. MILITELLO: Objection, form.
MR. LEGRAND: What's the objection?
MS. MILITELLO: It's vague and ambiguous. I don't know what you mean, configured.
Q. BY MR. LEGRAND: What was in the box?
A. In the box was a Ruger AR-556 modern sporting rifle, and it had the magazine separate from the rifle. You can't shoot the AR-556 without the magazine in the rifle.
Q. What did you say?
A. You can't shoot the AR-556 without the magazine in the rifle.
Q. Can you shoot it in a semiautomatic fashion?
A. No, sir.
Q. So in order to shoot it in a semiautomatic fashion, it has to have the magazine, correct?
A. The magazine would have to be attached to the Ruger AR-556.
Q. Am I correct that both Ruger and Academy, on both their websites, describe the Ruger AR-556 as a semiautomatic weapon?
MS. MILITELLO: Objection, form.
THE WITNESS: That I am not aware of.
Q. BY MR. LEGRAND: Have you looked at Academy's

Texas, that you have to comply with both Texas law and the law of the state of the purchaser?

A. Yes. We have a map that tells us who we can and cannot sell long guns to.

Q. So you knew that when you sold what you sold to Mr. Kelley, you knew that he was from Colorado?

A. Colorado Springs, Colorado, yes.

Q. If he had been from Denver, Colorado, would you have sold him this product?

A. No, sir, he would not be able to.

Q. Why?

A. Because it states on the map that we have -- that residents from Denver, Colorado, may not purchase MSRs.

Q. So you rely on the map?

A. Yes, we do. That's in compliance from -- that Academy corporate gives us.

Q. Who makes that map?

A. That I do not know.

Q. So you just rely on the map?

A. Yes.

Q. So you don't know Colorado law. You depend on somebody else to know that?

A. We depend on the map because it's updated when regulations change.

Q. So you know that somebody within Academy somewhere in compliance made that map?

A. That I don't know.

Q. You don't know where the map came from?

A. I don't know where the map came from.

Q. But you're supposed to comply with that map, correct?

A. Yes. They send it to our store and we comply by that map.

Q. Does the map say that you can't sell this Ruger AR-556 to somebody from Denver?

A. Yes, it does.

Q. But you can sell it to somebody from Colorado Springs?

A. Yes.

Q. Why is it you can't sell it to somebody from Denver?

MS. MILITELLO: Objection, form.

THE WITNESS: We are going by what the map says.

Q. BY MR. LEGRAND: Do you know why the map says you can't sell it to somebody from Denver?

MS. MILITELLO: Objection, asked and answered.

THE WITNESS: I go by the form that we get.

Q. BY MR. LEGRAND: So if the map says don't sell

what the law of Colorado is, or the law of Michigan is, or the law of the District of Columbia, you trust and rely on whoever did that map to tell you whether or not you can make the sale; would that be accurate?

A. Yes, we do trust in that map because regulations change all the time. You have different states that vote in and vote out these regulations all the time, so our map does get updated. Any time that they have an update, they send us a current map.

Q. So is it possible for the map to be wrong?

MS. MILITELLO: Objection, form. It's an incomplete hypothetical, didn't occur in this case.

Why don't we talk about this case, because the judge did say this was limited discovery for purposes of responding to the motion for summary judgment, which is limited to the facts of this case.

Q. BY MR. LEGRAND: Is it possible for the map to be wrong?

MS. MILITELLO: Same objection.

THE WITNESS: We do receive that map, you know, when they are corrected, and we go by that.

Q. BY MR. LEGRAND: On April, I think it was 7th, of 2016, that's when you sold this Ruger AR-556 to Devin Kelley, correct?

A. Yes. Devin Kelley came and purchased the

Ruger AR-556 legally, yes.

Q. Did you look at the map to see if it was okay to sell it to him?

A. Yes. As I stated before, I looked at the map.

Q. And we'll get into the map a little bit, but you've already agreed with me that if he had been from Denver, you wouldn't have sold it to him, correct?

A. I would not have sold him the firearm if he was from Denver.

Q. Why is that?

A. Because the map tells us.

Q. Did the map tell you you could sell it to him if he was from Colorado Springs?

A. Yes, it did.

Q. And he was from -- was his address in Colorado Springs?

A. Yes. His identification was a valid driver's license from Colorado Springs.

Q. Now looking at Academy 2301, does that document actually consist of 2301, 2302, and 2303?

MS. MILITELLO: Objection, form.

THE WITNESS: What was the question again, sir?

Q. BY MR. LEGRAND: The document that -- you told me, 4473, is that --

lawfulness of the sale or the delivery of a long gun, rifle, or shotgun to a resident of another state."

Have I read that correctly?

A. Yes.

MS. MILITELLO: Objection, form.

Q. BY MR. LEGRAND: Okay, and then it says --

MS. MILITELLO: No, you haven't, but that's okay.

Q. BY MR. LEGRAND: Then it says, "The seller is presumed to know the applicable state laws and published ordinances in both the seller's state and the buyer's state."

Have I read that correctly?

A. Yes, you read it off the form correctly.

Q. Did you know that before today?

A. Yes, we are aware of that information.

Q. So you knew at the time you sold this to Mr. Kelley that you had to comply with both Texas and Colorado law, correct --

MS. MILITELLO: Objection, asked and answered.

Q. BY MR. LEGRAND: -- in making this sale?

A. We did abide by the information right there, going by the map for Academy.

Q. So you used the map to determine whether you were complying with Colorado law or not, correct?

A. Yes.

Q. And that's what your higher-ups tell you to do, correct?

A. We receive that information when that information is given.

Q. So if it's a sale to somebody outside -- that's from outside the state of Texas, you go by that map and you rely on that map, correct?

A. Yes.

Q. So if the map had said Colorado Springs, you would have sent Mr. Kelley on down the road, and you never would have even contacted the federal government, would you?

MS. MILITELLO: Objection, form.

THE WITNESS: We would not have transferred the firearm to Mr. Kelley.

Q. BY MR. LEGRAND: And you wouldn't have done a 4473 form either, correct?

A. We would have not allowed any progress to --

Q. So you wouldn't have even asked the government whether or not Mr. Kelley could buy a firearm or not, would you. You would have told him, "Our map says we can't sell this to you."

A. If the map says a certain state that does not require a firearm, we cannot sell that individual a

MR. WEBSTER: Objection to the sidebar comments. Objection to coaching the witness.

MS. MILITELLO: I'm not coaching the witness. I am trying to coach Mr. LeGrand.

Q. BY MR. LEGRAND: Clearly, you can answer now. She's finished. You can answer now.

Does that sentence say that Ruger equips the AR-556 with a magazine?

A. It does say that. It says for those states. So it's not specifying that Mr. Kelley purchased it in Colorado. It's -- Mr. Kelley purchased that firearm legally at Academy under Texas laws. Because he lived in Colorado Springs, not in Colorado or not in Denver; in Colorado Springs, Colorado.

Q. Are you saying the sentence is not clear to you?

MS. MILITELLO: Objection, form. Asked and answered. He's answered it. Please go on to the next one.

Q. BY MR. LEGRAND: Page 14 of Exhibit 8, is that note clear to you?

MS. MILITELLO: Objection, form, asked and answered.

Q. BY MR. LEGRAND: When Ruger says in their instruction manual that they equip the AR-556 with a

magazine, is that clear to you that they do that? Have you ever seen one come without a magazine?

MS. MILITELLO: Objection, form.

Q. BY MR. LEGRAND: [redacted], have you ever seen one come without a magazine?

A. No. All the firearms come with the magazine separate from the firearm.

Q. And it won't operate as a semiautomatic without it, will it?

A. You can still fire the firearm with a single round.

Q. Right. You can fire it as a single shot rifle?

A. Right.

Q. But do you agree that when you sell it, you represent it to be a semiautomatic?

MS. MILITELLO: Objection, form. Calls for a legal conclusion.

THE WITNESS: Again, the magazine comes in the box.

(Clarification requested by court reporter.)

Q. BY MR. LEGRAND: Mr. [redacted] --

MS. MILITELLO: Wait a minute. You're just barreling on.

(Clarification requested by court reporter.)

Q. BY MR. LEGRAND: Mr. [redacted], have you ever sold a semiautomatic rifle at Academy without a magazine?

MS. MILITELLO: Objection, form.

THE WITNESS: Again, all the firearms we sell have the magazine in the box.

Q. BY MR. LEGRAND: Do you agree that page 14 of the instruction manual says that Ruger equips the rifle with a magazine?

MS. MILITELLO: Objection, form. Misstates the entire -- it doesn't state clearly the entire document.

THE WITNESS: Yes, it is confusing, only because it does not specify the exact, you know, rulings on that --

Q. BY MR. LEGRAND: Now looking back at the Ruger website that's up here on the screen. Do you see where I have the little hand? It says, "Find the perfect AR-556 for you."

A. Yes.

Q. Okay. If I press on that, do you see what comes up?

A. Yes.

Q. And that is Exhibit 10, isn't it?

MS. MILITELLO: Objection, form.

MS. MILITELLO: I'm sorry, objection, form.

THE WITNESS: Again, the rifle comes where you can shoot it single or you can put a magazine in the firearm itself.

Q. BY MR. WEBSTER: Have you ever tried to shoot an AR-15 single?

A. Yes, I have. It can be done. You just gotta be real careful or you'll cut your finger off.

Q. Yes, it will; won't it? And it's difficult; isn't it?

A. It's really not too difficult, but the thing with that trigger pulling back, you know, it's a big --

Q. Right, because you got to pull it back at the same time and drop the round in --

A. And I've seen people shoot it with single shots like that also.

Q. Sure, I've done it myself.

But at the end of the day, that's really not how that gun operates; is it?

MS. MILITELLO: Objection, form, misleading. Are you saying it can't be operated or -- objection, form.

MR. WEBSTER: Thank you.

Q. BY MR. WEBSTER: Did you understand my question?

corner?

A. Then I probably wouldn't have transferred the firearm. I wouldn't have transferred the firearm.

Q. Why?

A. Because then I would have asked him for an ID from Texas.

Q. And he asked you earlier about these questions here. Do you remember this section in these areas, where it talks about the seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction?

A. Yes, I do.

Q. Do you remember that?

A. Yes.

Q. And then it says down here, "Consequently, the seller must be familiar with the provisions of 18 U.S.C section 922, 21 through 931, and the regulations in 27 CFR, part 478. Do you see that?

A. Yes.

Q. What are those?

A. It's just telling us that make sure he is the individual, that we're complying with all our regulations in transferring the firearm to this individual.

Q. Do you know what -- have you reviewed those

before?

A. I have not seen all the policies. I'm going by the policies that Academy gives us in place.

Q. Do you recall Academy ever giving you the actual provisions of 18 U.S.C. 921 through 931 to read?

A. Not that I'm aware of.

Q. Okay, and do you ever remember them ever giving you regulations in 27 CFR, part 478?

A. Not that I'm aware of.

Q. Okay, and then if you see down here it says, "In determining the lawfulness of the sale or delivery of the long gun, rifle, or shotgun," you'll agree with me that you delivered a long gun to Mr. Kelley, correct?

A. He purchased this.

Q. Yeah, "To a resident of another state." Mr. Kelley was from another state; wasn't he?

A. Yes.

Q. "That the seller is presumed to know the applicable state laws and published ordinances in both the seller's state and the buyer's state." Do you see that?

A. Yes.

Q. Who was the buyer?

A. Devin Kelley.

Q. Can you tell me what the state laws and public

MS. MILITELLO: Objection, form. This is harassing. Ask him about the sale.

MR. WEBSTER: I'm asking about the sale. Objection to your sidebar comments.

THE WITNESS: Again, when we sold the firearm to Devin Kelley, he did not show any signs of anything like that.

Q. BY MR. WEBSTER: Okay. But can you tell me as you sit here today what the applicable state laws and published ordinances were in Mr. Kelley's state as it states here on the document you signed off on on 4/7/2016?

MS. MILITELLO: Objection, form.

THE WITNESS: Yes, we can, by the map that we were given.

Q. BY MR. WEBSTER: Where is there any Colorado statutes or applicable published -- applicable state laws or published ordinances in the book you got there in front of you, sir?

MS. MILITELLO: Objection, form.

THE WITNESS: Again, everything we get is going by this map.

Q. BY MR. WEBSTER: Okay, and you're saying the map, right. And all I'm asking you is the map that you're looking at that the jury can see right here, can

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF R.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR;	)	IN THE DISTRICT COURT
Plaintiffs,	)	
vs.	)	
ACADEMY, LTD D/B/A ACADEMY SPORTS + OUTDOORS,	)	
Defendants.	)	224TH JUDICIAL DISTRICT

REPORTER'S CERTIFICATION
VIDEOTAPED AND ORAL DEPOSITION OF
[redacted]
November 7, 2018

I, LISA A. BLANKS, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, [redacted] was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on Nov. 21, 2018 to the witness or to the attorney for the witness for examination, signature and return to me by Dec. 11, 2018;

That the amount of time used by each party at the deposition is as follows:

George LeGrand - 2 hours, 17 minutes
Jason Webster - 32 minutes
Justin Demerath - 25 minutes
Marco Crawford - 9 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for parties of record:

For the Plaintiffs Rosanne Solis and Joaquin Ramirez:

STANLEY BERNSTEIN, ESQ.
GEORGE LEGRAND, ESQ.
2511 North St. Mary's Street
San Antonio, Texas 78212-3760
210.733.9439

For the Plaintiffs Dalia Lookingbill, et al:

THE WEBSTER LAW FIRM
BY: JASON C. WEBSTER, ESQ.
6200 Savoy Drive, Suite 150
Houston, Texas 77036
713.581.3900
jwebster@thewebsterlawfirm.com

BRADY CENTER TO PREVENT GUN VIOLENCE
BY: ERIN DAVIS, ESQ.
BY: ROBERT CROSS, ESQ.
840 First Street, NE, Suite 400
Washington, DC 20002
202.370.8106
edavis@bradymail.org
rcross@bradymail.org
(appeared via telephone.)

For the Plaintiff Roy White, Individually and on behalf of Lula White:

HILLIARD MARTINEZ GONZALES LLP
BY: DAVID RUNCIE, ESQ.
719 S. Shoreline Blvd.
Corpus Christi, Texas 78401
361.882.1612
druncie@hmglawfirm.com

For the Plaintiffs Chancie McMahan, Individually and as Next Friend of R.W., a minor; Roy White, Individually and as Representative of the Estate of Lula White; and Scott Holcomb:

THOMAS J. HENRY
BY: DENNIS BENTLEY, ESQ.
BY: MARCO CRAWFORD, ESQ.
5711 University Heights Blvd., Suite 101
San Antonio, Texas 78249
210.656.1000
dbentley@tjhlaw.com

For the Plaintiffs Chris Ward, individually and as next friend of Ryland Ward and for the estates of Joann Ward and Brooke Ward:

ANDERSON & ASSOCIATES LAW FIRM
BY: KELLY KELLY, ESQ.
2600 SW Military Drive, Suite 118
San Antonio, Texas 78224
210.928.9999
kk.aalaw@yahoo.com

For the Intervenor Mr. Brady:

O'HANLON DEMERATH & CASTILLO
BY: JUSTIN B. DEMERATH, ESQ.
808 West Avenue
Austin, Texas 78701
512.494.9949
jdemerath@808west.com

For the Defendant Academy Ltd., Sports + Outdoors:

LOCKE LORD LLP
BY: JANET E. MILITELLO, ESQ.
600 Travis, Suite 2800
Houston, Texas 77002
713.226.1208
jmilitello@lockelord.com

I further certify that I am not related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further, that I am not financially or otherwise interested in the outcome of the action.

Further certification requirements pursuant to Rule 203 of TRCP will be certified to after they have occurred.

Certified to by me this 8th day of November.

Lisa A. Blanks

LISA A. BLANKS, RPR, CRR, CSR
Certification Number: 4266
Certification Expiration 12/31/18
Firm No. 10766
Paszkiewicz Court Reporting
39 Executive Plaza Court
Maryville, IL 62062

FURTHER CERTIFICATION UNDER RULE 203 TRCP

~~The original deposition~~ A copy of the signature page (was)/was not returned to the deposition officer on Nov. 29, 2018;

If returned, the attached Changes and Signature page contains any changes and the reasons therefor;

If returned, the original deposition was delivered to George LeGrand, Custodial Attorney;

That $2,723.44 is the deposition officer's charges to the Plaintiff for preparing the original deposition transcript and any copies of exhibits;

That the deposition was delivered in accordance with Rule 203.3, and that a copy of this certificate was served on all parties shown herein on Jan. 14, 2019 and filed with the Clerk.

Certified to by me this 14 day of January 2019.

Lisa A. Blanks

LISA A. BLANKS, RPR, CRR, CSR
Certification Number: 4266
Certification Expiration 12/31/18
Firm No. 10766
Paszkiewicz Court Reporting
39 Executive Plaza Court
Maryville, IL 62062

[redacted]

November 7, 2018

CHANGES AND SIGNATURE

WITNESS NAME: [redacted]

DATE OF DEPOSITION: NOVEMBER 7, 2018

PAGE	LINE	CHANGE	REASON
11	9	YOU CAN	SHE PUT CAN'T
11	12	YOU CAN	SHE PUT CAN'T
12	9	ONE ROUND	ADD ROUND
95	3	IT'S REFERING	PUT RETURNING
129	4	FIREARM WITH A 30 ROUND MALAZINE	ADD 30 ROUND MAGAZINE

MR 309

[redacted]

November 7, 2018

I, [redacted], have read the foregoing deposition and hereby affix my signature that same is true and correct, except as noted above.

[redacted]

THE STATE OF Texas)
COUNTY OF Bexar)

Before me, Angela Nicole Ash, on the day personally appeared [redacted], known to me (or proved to me under oath or through TxDL) (description of identity card or other document), to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 26th day of November, 2018.

ANGELA NICOLE ASH
Notary Public, State of Texas
Comm. Expires 10-04-2022
Notary ID 131748947

NOTARY PUBLIC IN AND FOR
THE STATE OF Texas
MY COMMISSION EXPIRES:
10/04/2022

MR 310

AFFIDAVIT OF JOSEPH J. VINCE, JR.

STATE OF MARYLAND §
COUNTY OF FREDERICK §

Before me, the undersigned authority, on this day personally appeared Joseph J. Vince, Jr., a person whose identity is known to me. After I administered an oath to him, upon his oath, he said:

1. My name is Joseph J. Vince, Jr. I am of sound mind and capable of making this affidavit. I am over the age of eighteen (18) and I have never been convicted of a felony. I have personal knowledge of the facts stated in this affidavit and they are true and correct.

2. I have spent a career in law enforcement, including almost 30 years with the Bureau of Alcohol, Tobacco and Firearms ("ATF"). During my time with ATF, I served in various capacities, from field special agent, to my last assignment, establishing and being the first Chief of the Crime Gun Analysis Branch. Since my retirement from ATF, I have worked on and continued to study firearms-related violent crime issues, including as President of Crime Gun Solutions ("CGS"), teaching at the university level, serving as a subject area expert and consultant, and as a member of the International Association of Chiefs of Police ("IACP") firearms committee. My attached C.V. details my experience, education, and study in this field.

I have extensive experience and expertise in firearms laws, the firearms industry, how criminals obtain and use firearms, the standard of care for firearms industry members, and the role firearms industry practices can play-in contributing to, or preventing criminal access to firearms.

I have been accepted as a qualified expert witness in court in several cases, testifying about my extensive experience and expertise in firearms laws, the firearms industry, how criminals obtain and use firearms, the standard of care for firearms industry members, and the role firearms industry practices can play-in contributing to, or preventing criminal access to firearms.

3. My opinions are based on my observations and research, and are drawn from (i) my training, study, and experience in law enforcement and in particular in firearm law enforcement; (ii) a review of published studies and other materials relating to firearm security and safe use practices, and the diversion of guns to criminals; (iii) working with the firearms industry; (iv) government publications; (v) manufacturer supplied information; and (vi) deposition testimony and court documents supplied to me by plaintiffs' attorneys.

4. I have been retained in this matter and am available and willing to testify to admissible facts or opinions including but not limited to issues related to this matter being inappropriate for summary disposition. It is my opinion that:

a) Under the Gun Control Act, federally-licensed firearms dealers ('FFLs') serve the role as "gatekeepers," the first line of defense to prevent firearms from falling into the hands of criminals, terrorists, the mentally ill, and persons with violent intentions. ATF reiterated this assertion to all FFLs in a periodic FFL Newsletter, dated September 2013, Volume 1, Best Practices, Page 2, Column 2: "Remember, the FFL is ATF's first line of defense in preventing firearms from getting into the hands of criminals."

b) An important part of the role of the members of the firearms industry is to strictly and comprehensively follow all federal and state firearms laws. A part of this responsibility is to ensure that all required records are prepared accurately and completely, and that appropriate Brady background checks are performed on the actual purchaser. Law enforcement relies on accurate information obtained by firearms dealers at the time of sale to aid investigations after crimes have been committed, to include the ability for ATF to trace a firearm from the time of the retail sale of the first retail purchaser and connect it to the criminal possessor. The information obtained at the time of sale is also critical in preventing criminals from obtaining guns, as responsible FFLs use this to determine the eligibility of the purchaser and do not consummate firearm sales to prohibited or otherwise illegible persons.

c) Another important duty performed by responsible firearms dealers is to act as the 'eyes and ears' of law enforcement and to pay attention to indicators of illegal activity or known 'red flags', as well as all other available information in order to make judgements as to whether a firearm transfer should take place.

d) A potential transferee or customer may be someone who should not have a firearm for several reasons: including because he/she is a straw purchaser; a gun trafficker; a drug user; mentally ill; ineligible to purchase firearms in another jurisdiction; or someone with dangerous intentions or tendencies, and it can be illegal and extremely dangerous to the public-at-large for such a person to possess firearms. Often such information will not be revealed in the federally-required forms or background checks. Law enforcement is generally not in-the-store, does not have all pertinent information leading to the sale or transfer, and is often not at the point of sale at the time of transfer. An important part of the responsibility of the firearms dealer is to make the judgement as to whether such a transfer should take place, and to not transfer firearms to those who should not possess them. Making good judgement determinations and following the law and regulations depend upon obtaining and closely examining all information concerning the sale or transfer.

e) Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), United States Department of Justice is the agency that approves all federal firearms dealers'

licenses in the United States. ATF also provides an abundance of materials concerning all laws and regulations (federal/state/local) for legally transferring or selling firearms and ammunition (books, pamphlets, videos, and periodic newsletters). ATF also conducts regional seminars, has inspectors visit dealers at their premises, and is available 24 hours-a-day, 365 days-a-year to respond to FFL inquiries.

f) One of the many sources of materials is the ATF Federal Firearms Regulations Reference Guide 2014, ATF Publication 5300.4. That guide clearly cites under Title 18, U.S.C. § 922 Unlawful Acts., which provides, in relevant part:

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

. . .

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States). . ."

Written into the instruction accompanying ATF Form 4473 (5300.9), Revised April 2012. This version of the ATF Form 4473 was used in the Academy, LTD, D/B/A Academy Sports + Outdoors sale to Devin Patrick Kelley.

ATF provided on the Form 4473 used for the sale of the Ruger to Devin Patrick Kelley, on Page 3, Column 1:

"In determining the lawfulness of the sale or delivery of a long gun *(rifle or shotgun)* to a resident of another State, the seller is presumed to know the applicable State laws and published ordinances in both the seller's State and buyer's State."

g) The State of Colorado prohibits the sale or possession of large-capacity magazines for firearms (Colorado Revised Statutes, §18-12-302). The State of Colorado defines large-capacity magazines, in relevant part, as: "A fixed or detachable magazine, box, drum, feed strip, or similar device capable of accepting, or that is designed to be readily converted to accept, more than fifteen rounds of ammunition. . ." (Colorado Revised Statutes, §18-12-301 - Definitions)

h) One of the reasons Colorado and other states regulate large-capacity magazines is because they are favored by mass shooters and can be used to facility mass causality events. For example, the shooters at the Aurora theater, Sandy Hook elementary school, Pulse nightclub, Navy Operational Support Center and the Marine Corp Reserve Center, all used large-capacity magazines.

i) Sturm, Ruger & Co., Inc. manufactures RUGER® AR-556® rifles in a variety of models that are described by the company as "a gas impingement driven box magazine fed, autoloading rifle." (See Ruger AR-556 Autoloading Rifle Instruction Manual at 10, (http://ruger-docs.s3.amazonaws.com/_manuals/AR-556-Mt92d8ha1p5g.pdf) .As such, because these autoloading firearms are designed to be box magazine fed, the magazine is a significant and integral component part of the firearm and each rifle is sold with a magazine enclosed. These firearms cannot be operated, as designed, without the use of a magazine which accompanies each firearm sold.

j) The United States Code of Federal Regulations lists a magazine as a component part of a firearm that would be ordinarily attached to the firearm.

27 C.F.R. § 53.61 - Imposition and Rates of Tax states, in relevant part. . .

"(b) Parts or accessories -

(1) ***In general***. No tax is imposed by section 4181 of the Code on the sale of parts or accessories of firearms, pistols, revolvers, shells, and cartridges when sold separately or when sold with a complete firearm for use as spare parts or accessories. The tax does attach, however, to sales of completed firearms, pistols, revolvers, shells, and cartridges, and to sale of such articles

that, although in knockdown condition, are complete as to all component parts.

(2) ***Component parts***. Component parts are items that would ordinarily be attached to a firearm during use and, in the ordinary course of trade, are packaged with the firearm at the time of sale by the manufacturer or importer. All component parts for firearms are includible in the price for which the article is sold.

. . .

(5) Examples –

(i) ***In general.*** The following examples are provided as guidelines and are not meant to be all inclusive.

(ii) ***Component parts.*** Component parts include items such as a frame or receiver, breech mechanism, trigger mechanism, barrel, buttstock, forestock, handguard, grips, butt plate, fore end cap, trigger guard, sight or set of sights (iron or optical), sight mount or set of sight mounts, a choke, a flash hider, a muzzle brake, a magazine (emphasis added), a set of sling swivels, and/or an attachable ramrod for muzzle loading firearms when provided by the manufacturer or importer for use with the firearm in the ordinary course of commercial trade. Component parts also include any part provided with the firearm that would affect the tax status of the firearm, such as an attachable shoulder stock.". . .

ATF, both on its website (https://www.atf.gov/firearms/firearms-guides-importation-verification-firearms-ammunition-and-implements-war-self) and in the ATF Guidebook – Importation & Verification of Firearms, Ammunition, and Implements of War: Terminology & Nomenclature, identifies a firearm magazine (hinged, detachable and tubular magazines) as a component part of a self-loading (semiautomatic) firearm.

k) It is my opinion that the large-capacity magazine included with the RUGER® AR-556® sold to Devin Patrick Kelley is a component part of this semi-automatic firearm.

l) Sturm, Ruger & Co., Inc. clearly states in bold red letters on its website that its RUGER® AR-556® rifles are: "NOW AVAILABLE IN A STATE COMPLIANT MODEL THAT IS LEGAL FOR SALE IN THE FOLLOWING, OTHERWISE RESTRICTED LOCATIONS: COLORADO, HAWAII, MARYLAND, NEW JERSEY AND PUERTO RICO." (https://www.ruger.com/products/ar556/models.html)

m) In the Sturm, Ruger & Co., Inc. 'Nomenclature' section of the Instruction Manual for RUGER® AR-556® Autoloading Rifle, it clearly states that this firearm has model(s) that are not compliant with states who have significant restrictions on firearms and model(s) that can be sold in these states. ." (See Ruger AR-556 Autoloading Rifle Instruction Manual at 7, (http://ruger-docs.s3.amazonaws.com/_manuals/AR-556-Mt92d8ha1p5g.pdf) One of the model(s) of the RUGER® AR-556® Autoloading Rifle that is compliant with the State of Colorado is the Model 8511. The Model 8511 is packaged with and accepts a 10-round magazine. The smaller magazine size is the only key operating component that is different between the Model 8500 and the Model 8511.

n) A 30-round magazine, as packaged with the RUGER® AR-556® Autoloading Rifle, Model 8500, allows the shooter to fire more shots without reloading than the 10-round magazine included with the Model 8511. Because a shooter with a larger-capacity magazine has to reload the firearm less frequently, the victims of shootings have less opportunity to flee or fight back when a shooter opens fire. The mass shooting in Tucson, Arizona involving United States Representative Gabrielle Gifford, for example, was stopped when the shooter was changing magazines.

o) The Academy Sports + Outdoors' website, (https://www.academy.com/shop/pdp/ruger-ar-556-556-semiautomatic-rifle#repChildCatid=136473) lists the Ruger AR-556, Model 8500, 5.56 caliber, semiautomatic rifle, including a 30-round magazine, as having a Stock Keeping Unit number of **SKU:** 103530047.

p) On April 7, 2016, Academy, LTD, D/B/A Academy Sports + Outdoors, 2024 N. Loop 1604 East, San Antonio, Texas, illegally sold a Ruger AR-556, Model 8500, caliber 5.56 NATO, with manufacturer enclosed 30-round magazine, bearing serial number 852-06623 to Devin Patrick Kelley, a person who identified himself and produced identification as being a resident of the State of Colorado.

q) On April 7, 2016, during the illegal sale to Kelley, employees of Academy, LTD, D/B/A Academy Sports + Outdoors, 2024 N. Loop 1604 East, San Antonio, Texas, did not specify the model of the firearm on the ATF Form 4473, Firearms Transaction Record, Part 1, Over-the-Counter, as required by law. This is a clear indication that the Academy Sports + Outdoors' employees involved in this transaction either did not know that the non-compliant model did not meet the requirements of 18 U.S.C., § 922(b)(3) (described above in 4(f) of this affidavit) and could not legally be sold to Kelley, or they intentionally did not use the correct

nomenclature to hide the fact that they were selling this firearm to Kelley that they were prohibited from transferring to him.

r) Academy Sports + Outdoors violated the standard of care of a federally-licensed firearms dealer by not adequately being versed-in and training employees in the firearm products they sell to ensure that they meet all state and federal firearm laws and regulations prior to their sale, thus enabling Devin Patrick Kelley to acquire a firearm he was prohibited from possessing.

s) Academy Sports + Outdoors violated the standard of care of a federally-licensed firearms dealer by failing to institute correct and appropriate policies and procedures to ensure that firearms sold meet all state and federal firearm laws and regulations when selling firearms.

t) Academy Sports + Outdoors violated the standard of care of a federally-licensed firearms dealer by illegally selling a firearm to a person they knew or had reasonable cause to believe was prohibited from possessing a firearm that had as its component part a 30-round magazine.

u) Academy Sports + Outdoors violated the standard of care of a federally-licensed firearms dealer by placing at-risk the safety of the public, including the Plaintiffs, by not adequately verifying that Devin Patrick Kelley was prohibited from purchasing a firearm that had as a component part a 30-round magazine.

v) In my opinion, based upon my experience and my review of ATF material, Sturm, Ruger & Co., Inc.'s business practices, Academy Sports + Outdoors' business practices, and the Code of Federal Regulations, the sale of the Ruger AR-556, Model 8500, caliber 5.56 NATO, with manufacturer enclosed 30-round magazine, bearing serial number 852-06623 to Devin Patrick Kelley violated 18 U.S.C., § 922(b)(3) because the transfer of this firearm did not satisfy all the "legal conditions of sale from both Texas and Colorado as incorporated into federal law by 18 USC § 922 (b)(3). This was because a large-capacity 30-round magazine prohibited in Colorado was a component part, and an integral part of the sale, of the Ruger firearm that was sold to Devin Patrick Kelley. Academy Sports + Outdoors' knowing violation of a federal law directly caused plaintiffs harm by giving Devin Patrick Kelley a weapon he was prohibited from possessing and that he then used to injure and kill plaintiffs.

w) An individual who seeks to evade the firearms laws of his home state and purchase more lethal weaponry than he can acquire in his home state is, inherently, showing an indicator that is likely to misuse the firearm in a violent and criminal manner.

Thus, when Devin Patrick Kelley appeared in an Academy Sports + Outdoors' Texas store and asked to purchase a Ruger AR-556, Model 8500, semi-automatic rifle with 30-round large capacity magazine that he was prohibited from possessing under Colorado law, as incorporated into federal law under 18 USC § 922 (b)(3), he was indicating that he was a dangerous individual seeking to evade the law. Academy Sports + Outdoors, a federally licensed firearms dealer, knew or should have known this reality, contacted law enforcement, and refused the sale to Kelley.

FURTHER AFFIANT SAYETH NOT.

Joseph J. Vince, Jr.

SWORN AND SUBSCRIBED before me on this the 23rd day of January, 2019.

Notary Public in and for the State of MD

TRISTAN RAMKISSOON
Notary Public
Washington County
Maryland
My Commission Expires Oct. 31, 2019

Joseph J. Vince, Jr.
2214 W. Greenleaf Drive
Frederick, MD 21702
(301) 631-2950•JVincecgs@msn.com

Education

1979 M. A., *University of Detroit*, Detroit, MI
Criminal Justice

1970 B. A., *Youngstown State University*, Youngstown, OH
Major: Criminal Justice
Minor: History and Education

Formal Managerial Training

January 1994 *Senior Executive Service Candidate*, SES, Washington, DC

March 1987 *Leadership Development Program*, Center for Creative Leadership, Greensboro, NC

August 1981 *Executive Development Seminar*, OPM, Kings Point, NY

February 1980 *Supervision and Group Performance*, OPM, St. Louis, MO

Experience

May 2002-Present	Faculty	**Professor – Mount St. Mary's Univ., Emmitsburg, MD**
January 1999-Present	President	***Crime Gun Solutions LLC***
June 2113 – Present	Member	**Amer. Bar Association – 'Stand Your Ground' Task Force**
2010 - Present	Member	**Board Member-Frederick Comm. College-CJ Depart.**
January 2002–2004	Member	***State and Local LE Advisory Board to the U.S. Counterdrug Intelligence Coordinating Group (CDX) US Department of Justice***
February 2001–2004	Member	***Government Intelligence Training Initiative***
May 2005 – 2008	Board of Dir.	***American Hunters and Shooters Association, Inc.***

US Bureau of Alcohol, Tobacco and Firearms (ATF)

July 1997-January 1999	Chief	Crime Gun Analysis Branch, Falling Waters, WV
July 1995-July 1997	Chief	Firearms Enforcement Division, Headquarters, Washington, DC
July 1993-July 1995	Deputy Chief	Firearms Enforcement Division, Headquarters, Washington, DC
March 1991-July 1993	Special Agent In Charge	Division Office, Chicago, IL
October 1986-March 1991	Assistant Special Agent in Charge	Team Supervisor, ATF Southeast National Response Team (NRT); Division Office, Miami, FL
January 1985-October 1986	Special Agent In Charge	Intelligence Branch, Headquarters, Washington, DC
November 1983-January 1985	Special Agent In Charge	Firearms Tracing Branch, Headquarters, Washington, DC
June 1983-November 1983	Operations Officer	Firearms Division, Headquarters, Washington, DC

August 1979-June 1983	Resident Agent In Charge	Division Office, Omaha, NE
October 1974-August 1979	Criminal Investigator	Special Agent, Division Office, Flint, MI
May 1971-October 1974	Criminal Investigator	Special Agent, Division Office, Detroit, MI

Other Law Enforcement Experience

June 1969-May 1971 Deputy Sheriff **Trumbull County Sheriff's Office, Warren, OH**

Awards

1997	*Innovations in American Government, Finalist*	Presented by the Ford Foundation and the John F. Kennedy School of Government at Harvard University for work on the project "Disarming the Criminal"
1996	*Vice Presidential Hammer Award*	Three awards were presented for innovations in Federal Firearms Enforcement
1997	*ATF Gold Star Award*	Awarded for wounds received in line-of-duty

Numerous other awards and recognition have been presented throughout 27 years of service for the United States Department of the Treasury, Bureau of Alcohol Tobacco and Firearms by the United States Government and by other law enforcement agencies for quality investigative work and courageous leadership

Other Pertinent Experience

Publications/Research

2015	Firearms Training & Self-Defense: Does the Quality and Frequency of Training Determine the Realistic Use of Firearms by Citizens for Self-Defense	Study Prepared for the National Gun Victims Action Council, Chicago, IL
2014	The ABA National Task Force on Stand Your Ground Laws –	Findings Published by American Bar Association
2004	Evidence Collection Toolbox & Field Guide	Criminal Justice textbook and field guide to be published by Jones & Bartlett in March 2005.
1998	Youth Crime Gun Interdiction Initiative	Crime Gun Analysis Reports of the Illegal Youth Firearms Markets in 27 Communities
1997	Youth Crime Gun Interdiction Initiative	Crime Gun Analysis Reports of the Illegal Youth Firearms Markets in 17 Communities
1992	Protecting America: The Effectiveness Of the Federal Armed Career Criminal Statutes	A Study by The Bureau of Alcohol, Tobacco and Firearms, United States Department of the Treasury
1986	The Encyclopedia of Police Science	Contributing writer
1983	"MERT – Response for the 80's"	Law Enforcement Periodical
1980	"Achievement Through Cooperation"	Nebraska Law Enforcement Magazine

Authored or managed numerous studies and reports for ATF, which were utilized by the White House, Congress, other law enforcement agencies for policy and strategic matters.

Organizations

Member, International Association of Chiefs of Police

Member, International Association of Chiefs of Police, Firearms Committee Member & Consultant

Member, American Society of Law Enforcement Trainers

MR 320

Public Instruction

Lectures, Speeches and Presentations to Numerous Law Enforcement Groups, Academies/Universities in Reference to ATF's Mission, Findings and Accomplishments (Both U.S. & Abroad).

Media Appearances

Quoted in newspapers as firearms-related crime/law enforcement expert to include:
New York Times, Wall Street Journal, Washington Post, Washington Times, USA Today and other national and international publications.
Appeared on Radio and TV commenting on crime and law enforcement issues to include:
60 Minutes, CNN, ABC, CBS, FOX, PBS as well as local television stations across the U.S. and internationally to include: Canada, Great Britain, and Japan

MR 321

CIRCUIT COURT OF OREGON
Fifteenth Judicial District

MARTIN E. STONE
Judge

Coos County Courthouse
Coquille, Oregon 97423
(541) 396-4117

August 13, 2018

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Re: Vivian Englund v. World Pawn Exchange, LLC, J&G II, Inc., Richard James Sinatra and Diane Boyce; Coos Circuit Court No. 16CV00598

Counsel:

This case came before the court on July 6, 2018 for argument on (1) plaintiff's motion for partial summary judgment, and (2) defendant J&G II, Inc.'s motion for summary judgment. After hearing argument the court requested further briefing on several questions raised, including evidence in this record of proximate cause.

The court has reviewed the supplemental briefs and considered the argument and authorities presented.

BACKGROUND

This case involves on-line purchases of several firearms from an out-of-state seller J&G II, Inc. ("J&G"). The lawsuit arises out of the death of Kirsten Englund at the hands of Jeffrey Boyce. The murder weapon was a Makarov semiautomatic handgun sold by defendant J&G and shipped to defendant World Pawn in Coos County, Oregon.

In December 2011, Diane Boyce, the mother of Jeffrey Boyce, purchased on-line an AK 47 rifle from a non-party firearms dealer in Minnesota. The rifle was purchased in her name and shipped to World Pawn for ultimate transfer to Ms. Boyce. She appeared at World Pawn, completed the required paperwork and the rifle was delivered to her.

In January 2012, Ms. Boyce purchased a Makarov pistol on-line from J&G. J&G entered the order in its computer. Ms. Boyce used her credit card to purchase the firearm. The invoice identified her as the purchaser. J&G shipped the pistol to World Pawn for transfer. Ms. Boyce appeared at World Pawn, completed the required paperwork and the firearm was delivered to her.

In February 2012, Jeffrey Boyce purchased a Rock Island pistol on-line from J&G. The purchaser was identified as Jeffrey Boyce. He paid with his mother's credit card . Shortly after the order, Jeffrey Boyce sent an e-mail to J&G stating that he was the purchaser and that he had used his credit card. J&G prepared an invoice which identified both Jeffrey Boyce and Diane Boyce. J&G shipped the Rock Island pistol and invoice to World Pawn for transfer to the purchaser. Diane Boyce appeared at World Pawn on February 27, 2012, completed the paperwork and the firearm was delivered to her.

All three firearms were stored at the residence of Diane Boyce. Jeffrey Boyce lived with her at that residence. He did not have a credit card and was unemployed.

On April 28, 2013 Jeffrey Boyce left the residence in the morning, travelled North on Highway 101 and shot and killed Ms. Englund with the Makarov pistol at a scenic overlook area. There was no evidence of any other firearm used in the murder. There was no evidence that the Rock Island pistol was at the crime scene.

Jeffrey Boyce returned to his mother's house after the murder. He left later in the morning. Diane Boyce learned that firearms were missing sometime after he left and contacted the sheriff.

Jeffrey Boyce was located the next day in California with the Rock Island pistol in his possession. He was arrested and later committed suicide while in custody. While in custody he said that only the Makarov pistol was brandished and used to murder Ms. Englund.

This wrongful death action was commenced on January 7, 2016 in Multnomah County. It was moved to Coos County on October 4, 2017. The Third Amended Complaint contains four claims for relief against J&G: (1) Negligence and Negligence Per Se; (2) Gross Negligence; (3) Negligent Entrustment; and (4) Public Nuisance.

SUMMARY OF MOTIONS

Defendant J&G argues that summary judgment should be granted on a number of grounds:

1. There is no evidence of proximate cause in the summary judgment record. The Rock Island pistol, alleged to be the weapon involved in the straw sale, was not the murder weapon.

2. The complaint does not come within one of the exceptions of the Protection of Lawful Commerce in Arms Act ("PLCAA").

3. The claims for negligence, gross negligence and public nuisance are precluded by the PLCAA.

4. There is no evidence in the summary judgment record to support a claim for negligent entrustment.

Plaintiff opposes defendant's motion and argues that partial summary judgment should be granted to plaintiff for several reasons:

1. Plaintiff has satisfied the first element of the "predicate exception" to the PLCAA (15 USC section 7903 (5)(A)(iii)) by showing that J&G violated one or more state or federal statutes relating to sales of firearms.

2. Plaintiff has satisfied the first, third and fourth elements of the negligence per se exception to the PLCAA (15 USC section 7903 (5)(A)(ii)) .

As discussed below, the court will deny plaintiff's motion for partial summary judgment. Further, and as discussed below, the court will deny defendant's summary judgment motion.

DISCUSSION

Summary judgment is appropriate when the "pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law." ORCP 47. No genuine issue of material fact exists, if, based upon the record before the court, "no objectively reasonable juror could return a verdict for the adverse party on the subject of the motion for summary judgment." ORCP 47. The court views "the facts and the reasonable inferences that may be drawn from them in favor of the nonmoving party." Scott v. State Farm Mut. Auto Ins. Co., 345 Or 146, 148 (2008).

There is evidence in this record from which a reasonable jury could find for plaintiff on claims not barred by the PLCAA.

The PLCAA is a federal statute that prohibits lawsuits brought by an individual against a manufacturer or seller of firearms unless the claims fit within one of six exceptions to the Act. Two of the exceptions may apply in this case:

"(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the qualified product, and the violation was a proximate cause of the harm for which relief is sought, including—

> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
>
> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18;"

The exception set forth in (iii) above, referred to as the "predicate exception", requires plaintiff to establish a knowing violation of a statute applicable to sale of firearms, which was the proximate cause of the harm.

Plaintiff has identified at least one statute that applies to the sale or marketing of firearms and that a reasonable juror could find was violated by J&G in the sale and transfer of the Rock Island pistol. ORS 166.416 (1) provides: "A person commits the crime of providing false information in connection with a transfer of a firearm if the

person knowingly provides a false name or false information or presents false identification in connection with a purchase or transfer of a firearm".

On this record a reasonable juror could find that J&G violated ORS 166.416 (1) by providing false information to World Pawn relating to the purchase and sale of the Rock Island pistol. Jeffrey Boyce placed the order for the pistol. He used his mother's credit card to purchase the firearm. The same credit card had been used several weeks earlier to purchase the Makarov pistol. J&G prepared an invoice which identified Jeffrey Boyce as the credit card owner. That invoice contained both the names of Jeffrey Boyce and Diane Boyce. Jeffrey Boyce sent an e-mail to J&G a day after the on-line order stating that he was the purchaser and had used his credit card (which was not true). J&G did not share this communication with World Pawn. Diane Boyce took possession of the Rock Island pistol from World Pawn.

A jury could find that J&G shipped the Rock Island pistol to World Pawn without knowing the actual purchaser, provided false information as to the person who paid for the firearm and included two names on the invoice. Further, a jury could find that J&G was aware of the suspicious circumstances surrounding the sale in that Boyce informed J&G that he was the purchaser and had used his credit card to acquire the firearm when in fact he had used his mother's credit card.

The predicate exception also requires proof that the violation of the statute was the proximate cause of damages. Defendant argues that there is no proof in the summary judgment record of proximate cause in that the firearm subject to the alleged straw purchase was the Rock Island pistol, but that the weapon used to murder Ms. Englund was a different weapon (the Makarov pistol) which had been purchased a month earlier under the name of Diane Boyce with her credit card, and delivered to her at World Pawn. Defendant points out that nothing in the information available to J&G at the time of the earlier sale indicated the existence of a straw sale. Furthermore, J&G argues that there is no direct evidence in the record showing that Jeffrey Boyce had the Rock Island pistol with him at the time of the murder, that it would be speculation to so conclude, and that it was not until the next day in California that the Rock Island pistol was found with Boyce. In fact, Boyce confessed that it was the Makarov that he brandished and used as the murder weapon.

The court agrees that there is missing from the summary judgment record direct evidence that Jeffrey Boyce had in his possession the Rock Island pistol when he murdered Ms Englund. Having said that however, plaintiff has filed an ORCP 47E affidavit stating that she has retained an expert prepared to testify to admissible facts or opinions which will create issues of fact. In a straw sale one individual buys a firearm with the purpose of transferring it to another. The stand-in, rather than the purchaser, completes the official forms and submits to any required background checks. As the court understands, plaintiff intends to offer evidence regarding policies and procedures that would be followed by ATF following a report of a straw sale by J&G or World Pawn: investigation of the incident, seizure of the firearm involved in the straw sale, investigation of a series of unlawful purchases by the individual and seizure of all

firearms in possession of the individual, in this case both the Rock Island and the Makarov. Defendant argues that this proffered testimony is pure speculation and contradicted by facts in the summary judgment record. That argument cannot be resolved at the summary judgment stage. Plaintiff will be required at trial to lay a foundation for the testimony of the witness, based on facts and not speculation.

The court agrees that if these facts were presented at trial a reasonable jury could find that a statutory violation was the cause of Ms. Englund's death. Had law enforcement been alerted to a potential straw sale by J&G or World Pawn in February 2012, it is forseeable that neither the Rock Island or Makarov would have been in the possession of Jeffrey Boyce on the day of the murder in April 2013.

Plaintiff also argues an "embolden" theory as proof of proximate cause. This court does not find support for that theory in either the Thongsy or Gonzalez cases cited in plaintiff's memo, and as mentioned above it would be speculation to conclude that plaintiff had multiple weapons in his vehicle on the date of the murder, In fact he returned to his mother's residence after the murder.

If plaintiff proves a predicate exception, the lawsuit survives, including all claims such as negligence and public nuisance. This court is aware that Multnomah Circuit Court Judge Michael Greenlick has previously ruled in this case that all claims may proceed under the predicate exception. See Greenlick Opinion dated June 30, 2017.The wording of the predicate exception is broad : "an action" may be commenced. 15 USC section 7903 (5)(a)(iii). The term "action" can mean the case as a whole, rather than individual claims. Fed.R.Civ.P. 2. Nothing in the language restricts a plaintiff from asserting multiple claims as part of the action. Furthermore, this interpretation is consistent with cases where plaintiffs have litigated multiple claims against gun dealers after first proving a predicate exception under section 7903 (5)(A)(iii). See Williams v. Beemiller, Inc, 100 AD3d 143 (2012); Smith and Wesson Corp v. City of Gary, 875 NE2d 422 (2007) (public nuisance claim falls within predicate exception of PLCAA) ; Chiapperini v. Gander Mtn. Co., 48 Misc 3d 865, 13 N.Y.S.3d 777 (2014). In Williams defendants moved to dismiss a complaint which contained claims for negligence, public nuisance and intentional violations of statutes. The court denied the motion to dismiss and held that the "action" was not precluded because it fell within the PLCAA predicate exception. The court in Chiapperini reached a similar result. There the complaint contained a number of claims against the seller of firearms, including negligence and public nuisance. Defendant argued that the entire case should be dismissed because it was barred by the PLCAA. The court disagreed, relying on Williams, and concluded:

> "Similar to Williams, this court finds two applicable PLCAA exceptions thereby permitting the entire complaint to proceed through litigation, without the need for a claim-by-claim PLCAA analysis."

Similarly, in Corporan v. Wal-Mart Store E, LP, 2016 US Dist LEXIS (2016), the US District Court in Kansas granted leave to file an amended complaint to include a

negligence claim under state law. A claim-by-claim analysis was not required under the predicate exception.

The cases identified by J&G in its original and supplemental briefs do not change this court's conclusion. Many of those cases do not involve a predicate violation of a law relating to firearms. See, e.g., Ileto v Glock, 565 F3d 1126 (2009) (plaintiff failed to identify a statute applicable to the sale and marketing of firearms); Delana v CED Sales, Inc., 486 SW3d 316 (2016) (no allegation of a predicate violation); Estate of Kim ex rel Alexander v Coxe et al, 295 P3d 380 (2013) (no violation of a state or federal law applicable to sale or marketing of firearms). Here, in contrast, plaintiff points to evidence that a fact finder may find satisfies the predicate exception, and because of that the negligence and public nuisance claims may go forward.

Plaintiff's Third Amended Complaint contains a negligence per se count in the first claim for relief. Plaintiff alleges that J&G violated one or more statutes in connection with sale of the Rock Island pistol and/or aided and abetted World Pawn in delivering the firearm to Diane Boyce, an individual who had not purchased the firearm. J&G argues that it did not knowingly violate either state or federal statutes relating to sales of firearms, and any violation, if proven, was not a proximate cause of the death of Ms. Englund.

On the summary judgment record there is evidence to support a negligence per se count, under either 15 USC Section 7903 (5)(A)(ii) or 7903 (5)(A)(iii). Negligence per se requires proof that a defendant violated a statute, that plaintiff was injured as a result of the violation, that plaintiff was a member of the class of individuals meant to be protected by the statute, and that the injury to plaintiff was the type of harm that the statute was enacted to protect. See McAlpine v. Multnomah County, 131 Or App 136, 144 (1994)

On this record there is evidence from which a reasonable jury could find the following : one or more statutes regulate the sale or transfer of firearms; J&G provided false information to World Pawn in connection with sale of the Rock Island pistol, thereby aiding or assisting World Pawn in the delivery of the firearm to an individual who was not the purchaser; the decedent was murdered as a result of the violation; and she was within the class of individuals intended to be protected by the statute. J&G denies that it knowingly violated any of the statutes identified by plaintiff, and that any violation, if proven, did not cause the death of Ms. Englund. These disputed issues of fact must be decided by a jury.

The Third Amended Complaint also contains a claim for negligent entrustment. Negligent entrustment is an identified exception to the PLCAA. 15 USC Section 7903 (5)(A)(ii). That exception has been narrowly construed. See Soto v Bushmaster Firearms Int'l, LLC, 2016 Conn Super LEXIS 2626 (2016). Notwithstanding the Connecticut court's construction, negligent entrustment is a common law claim for relief under Oregon law and may be more expansive than the exception under 15 USC

Section 7903 (5)(A)(ii). See generally Mathews v Federated Service Ins. Co., 122 Or App 124 (1993) (discussing elements of negligent entrustment) . If plaintiff proves a predicate exception, a claim for negligent entrustment under Oregon law may fit within that exception.15 USC Section 7903(5)(A)(iii).

"A plaintiff in a negligent entrustment case must prove there was an entrustment and that the entrustment was negligent". Mathews, supra at 133. There must be proof that the "entrustment was unreasonable under the circumstances, that it caused harm to plaintiff and that the risk of harm to plaintiff....was reasonably forseeable". Id at 133-134. The tort is based on the degree of knowledge a supplier of chattel had or should have concerning the entrustee's use of the item in an improper manner. Earsing v. Nelson, 212 A.D. 2d 66, 629 N.Y.S. 2d 563 (1995). The supplier is under a duty to entrust the chattel, in this case a firearm, to a responsible person whose use does not create an unreasonable risk of harm.

On this record there is evidence from which a reasonable jury could find negligent entrustment. The record contains indicators of a straw sale at the time the Rock Island pistol was shipped to World Pawn for transfer. Jeffrey Boyce had ordered the pistol on-line and used his mother's credit card. That card had been used the previous month to purchase the Makarov by Diane Boyce. J&G had in its possession an e-mail from Jeffrey Boyce stating that he was the purchaser and had used his credit card. J&G listed Jeffrey Boyce as the credit card owner (which was incorrect) and also identified two names on the invoice, Jeffrey Boyce and Diane Boyce. That invoice was sent to World Pawn in connection with the transfer. J&G did not send the e-mail it received from Jeffrey Boyce. World Pawn delivered the firearm to a person other than the purchaser.

On this record a reasonable jury could find that J&G was aware or should have been aware that one person had purchased the Rock Island and another person had paid for it. J&G transferred the firearm to World Pawn when it knew or should have known that it would be delivered by World Pawn to a person other than the purchaser (a straw sale).

J&G argues that any claim for negligent entrustment is limited by the definition contained in 15 USC Section 7903 (5)(B):

> "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

This court does not believe that this definition necessarily precludes plaintiff's claim, at least at this stage of the case. "Use" could include transfer of the weapon or discharge

of the weapon. Moreover, several cases across the country have allowed negligent entrustment claims in cases involving sales to straw purchasers. See Williams v. Beemiller, Inc, 100 A.D. 3d 143, 952 NYS2d 333 (2012); Shirley V. Glass, 44 Kan App 2d 688, 241 P.3d 134 (2010); Corporan v. Wal-Mart Stores, 2016 US Dist. LEXIS 93307 (2016); Chiapperini v. Gander Mtn. Co, 48 Misc 3d 865 (2014). There is evidence in the record that J&G furnished false information to World Pawn when it sent the firearm to Coos County, aware that World Pawn would use that information in the transfer of the item, and that J&G did not disclose the e-mail received from Jeffrey Boyce. World Pawn relied on the information from J&G and delivered the firearm to the alleged straw purchaser.

J&G denies the claim for negligent entrustment and argues that it legally transferred the Rock Island pistol to World Pawn. These are disputed issues of fact that must be decided by a jury.

CONCLUSION

1. Plaintiff's motion for partial summary judgment is denied.

2. Defendant J&G's motion for summary judgment is denied.

3. Plaintiff shall submit the order.

Sincerely,

Martin E. Stone
Circuit Court Judge

*CONTAINS SENSITIVE DATA

OMB No. 1140-0020

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

Firearms Transaction Record Part I - Over-the-Counter

WARNING: You may not receive a firearm if prohibited by Federal or State law. The information you provide will be used to determine whether you are prohibited under law from receiving a firearm. Certain violations of the Gun Control Act, 18 U.S.C. §§ 921 *et seq.*, are punishable by up to 10 years imprisonment and/or up to a $250,000 fine.

Prepare in original only. All entries must be handwritten in ink. Read the Notices, Instructions, and Definitions on this form. "PLEASE PRINT."

Transferor's Transaction Serial Number *(If any)*

Section A - Must Be Completed Personally By Transferee (Buyer)

1. Transferee's Full Name

Last Name	First Name	Middle Name *(If no middle name, state "NMN")*
Kelley	Devin	Patrick

2. Current Residence Address *(U.S. Postal abbreviations are acceptable. Cannot be a post office box.)*

Number and Street Address	City	County	State	ZIP Code
[redacted]	Colorado Springs	El Paso	CO	80904

3. Place of Birth		4. Height	5. Weight	6. Gender	7. Birth Date
U.S. City and State	-OR- Foreign Country				Month / Day / Year
San Marcos TX		Ft. 5 In. 10	(Lbs.) 235	☑ Male ☐ Female	[redacted]

8. Social Security Number *(Optional, but will help prevent misidentification)*: [redacted]

9. Unique Personal Identification Number *(UPIN)* if applicable *(See Instructions for Question 9.)*

10.a. Ethnicity
☐ Hispanic or Latino
☑ Not Hispanic or Latino

10.b. Race *(Check one or more boxes.)*
☐ American Indian or Alaska Native ☐ Black or African American ☑ White
☐ Asian ☐ Native Hawaiian or Other Pacific Islander

11. Answer questions 11.a. *(see exceptions)* through 11.l. and 12 *(if applicable)* by checking or marking "Yes" or "No" in the boxes to the right of the questions.

		Yes	No
a.	Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual buyer you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you. *(See Instructions for Question 11.a.)* Exception: *If you are picking up a repaired firearm(s) for another person, you are not required to answer 11.a and may proceed to question 11.b.*	☑	☐
b.	Are you under indictment or information in any court for a felony, or any other crime, for which the judge could imprison you for more than one year? *(See Instructions for Question 11.b.)*	☐	☑
c.	Have you ever been convicted in any court of a felony, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence including probation? *(See Instructions for Question 11.c.)*	☐	☑
d.	Are you a fugitive from justice?	☐	☑
e.	Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?	☐	☑
f.	Have you ever been adjudicated mentally defective *(which includes a determination by a court, board, commission, or other lawful authority that you are a danger to yourself or to others or are incompetent to manage your own affairs)* OR have you ever been committed to a mental institution? *(See Instructions for Question 11.f.)*	☐	☑
g.	Have you been discharged from the Armed Forces under dishonorable conditions?	☐	☑
h.	Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner? *(See Instructions for Question 11.h.)*	☐	☑
i.	Have you ever been convicted in any court of a misdemeanor crime of domestic violence? *(See Instructions for Question 11.i.)*	☐	☑
j.	Have you ever renounced your United States citizenship?	☐	☑
k.	Are you an alien illegally in the United States?	☐	☑
l.	Are you an alien admitted to the United States under a nonimmigrant visa? *(See Instructions for Question 11.l.)* If you answered "no" to this question, do NOT respond to question 12 and proceed to question 13.	☐	☑
12.	If you are an alien admitted to the United States under a nonimmigrant visa, do you fall within any of the exceptions set forth in the instructions? (If "yes," the licensee must complete question 20c.) *(See Instructions for Question 12.)* If question 11.l. is answered with a "no" response, then do NOT respond to question 12 and proceed to question 13.	☐	☑

13. What is your State of residence *(if any)*? *(See Instructions for Question 13.)* CO.

14. What is your country of citizenship? *(List/check more than one, if applicable. If you are a citizen of the United States, proceed to question 16.)* ☑ United States of America ☐ Other *(Specify)*

15. If you are not a citizen of the United States, what is your U.S.-issued alien number or admission number?

EXHIBIT 8 tabbies

I certify that my answers to Section A are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. I understand that answering "yes" to question 11.a. if I am not the actual buyer is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I understand that a person who answers "yes" to any of the questions 11.b. through 11.k. is prohibited from purchasing or receiving a firearm. I understand that a person who answers "yes" to question 11.l. is prohibited from purchasing or receiving a firearm, unless the person also answers "Yes" to question 12. I also understand that making any false oral or written statement, or exhibiting any false or misrepresented identification with respect to this transaction, is a crime punishable as a felony under Federal law, and may also violate State and/or local law. I further understand that the repetitive purchase of firearms for the purpose of resale for livelihood and profit without a Federal firearms license is a violation of law *(See Instructions for Question 16).*

16. Transferee's/Buyer's Signature	17. Certification Date
[signature]	4-7-16

Section B - Must Be Completed By Transferor (Seller)

18. Type of firearm(s) to be transferred *(check or mark all that apply)*:

☐ Handgun ☒ Long Gun *(rifles or shotguns)* ☐ Other Firearm *(Frame, Receiver, etc. See Instructions for Question 18.)*

19. If sale at a gun show or other qualifying event.

Name of Event _____

City, State _____

20a. Identification *(e.g., Virginia Driver's license (VA DL) or other valid government-issued photo identification.) (See Instructions for Question 20.a.)*

Issuing Authority and Type of Identification	Number on Identification	Expiration Date of Identification *(if any)* Month	Day	Year
CO DL	[redacted]	2	12	2020

20b. Alternate Documentation *(if driver's license or other identification document does not show current residence address) (See Instructions for Question 20.b.)*

20c. Aliens Admitted to the United States Under a Nonimmigrant Visa Must Provide: Type of documentation showing an exception to the nonimmigrant visa prohibition. *(See Instructions for Question 20.c.)*

Questions 21, 22, or 23 Must Be Completed Prior To The Transfer Of The Firearm(s) *(See Instructions for Questions 21, 22 and 23.)*

21a. Date the transferee's identifying information in Section A was transmitted to NICS or the appropriate State agency: *(Month/Day/Year)*

Month	Day	Year
4	7	2016

21b. The NICS or State transaction number *(if provided)* was: 36RMN9Z

21c. The response initially provided by NICS or the appropriate State agency was:

☒ Proceed ☐ Delayed
☐ Denied
☐ Cancelled

[The firearm(s) may be transferred on _____ (Missing Disposition Information date provided by NICS) if State law permits (optional)]

21d. If initial NICS or State response was *"Delayed,"* the following response was received from NICS or the appropriate State agency:

☐ Proceed _____ *(date)*
☐ Denied _____ *(date)*
☐ Cancelled _____ *(date)*
☐ No resolution was provided within 3 business days.

21e. *(Complete if applicable.)* After the firearm was transferred, the following response was received from NICS or the appropriate State agency on: _____ *(date).* ☐ Proceed ☐ Denied ☐ Cancelled

21f. The name and Brady identification number of the NICS examiner *(Optional)*

_____ *(name)* _____ *(number)*

22. ☐ No NICS check was required because the transfer involved only National Firearms Act firearm(s). *(See Instructions for Question 22.)*

23. ☐ No NICS check was required because the buyer has a valid permit from the State where the transfer is to take place, which qualifies as an exemption to NICS *(See Instructions for Question 23.)*

Issuing State and Permit Type	Date of Issuance *(if any)*	Expiration Date *(if any)*	Permit Number *(if any)*

Section C - Must Be Completed Personally By Transferee (Buyer)

If the transfer of the firearm(s) takes place on a different day from the date that the transferee *(buyer)* signed Section A, the transferee must complete Section C immediately prior to the transfer of the firearm(s). *(See Instructions for Question 24 and 25.)*

I certify that my answers to the questions in Section A of this form are still true, correct and complete.

24. Transferee's/Buyer's Signature	25. Recertification Date

Transferor (Seller) Continue to Next Page

STAPLE IF PAGES BECOME SEPARATED

ATF Form 4473 (5 300.9) Part I
Revised April 2012

Section D - Must Be Completed By Transferor (Seller)

26. Manufacturer and/or Importer *(If the manufacturer and importer are different, the FFL should include both.)*	27. Model	28. Serial Number	29. Type *(pistol, revolver, rifle, shotgun, receiver, frame, etc.) (See instructions for question 29)*	30. Caliber or Gauge
RUGER	AR-556	852-06623	RIFLE	5.56 NATO

30a. Total Number of Firearms *(Please handwrite by printing e.g., one, two, three, etc. Do not use numerals.)* ONE

30b. Is any part of this transaction a Pawn Redemption? ☐ Yes ☒ No

30c. For Use by FFL *(See Instructions for Question 30c.)*

Complete ATF Form 3310.4 For Multiple Purchases of Handguns Within 5 Consecutive Business Days

31. Trade/corporate name and address of transferor *(seller) (Hand stamp may be used.)*

[redacted]

32. Federal Firearms Licensee Number *(Must contain at least first three and last five digits of FFL Number X-XX-XXXXX.) (Hand stamp may be used.)*

FFL #5-74-00489

The Person Transferring The Firearm(s) Must Complete Questions 33-36. For Denied/Cancelled Transactions, The Person Who Completed Section B Must Complete Questions 33-35.

I certify that my answers in Sections B and D are true, correct, and complete. I have read and understand the Notices, Instructions, and Definitions on ATF Form 4473. On the basis of: (1) the statements in Section A (and Section C if the transfer does not occur on the day Section A was completed); (2) my verification of the identification noted in question 20a (and my reverification at the time of transfer *if the transfer does not occur on the day Section A was completed*); and (3) the information in the current State Laws and Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A.

33. Transferor's/Seller's Name *(Please print)*	34. Transferor's/Seller's Signature	35. Transferor's/Seller's Title	36. Date Transferred
[redacted]	[redacted]	FFL	4-7-16

NOTICES, INSTRUCTIONS AND DEFINITIONS

Purpose of the Form: The information and certification on this form are designed so that a person licensed under 18 U.S.C. § 923 may determine if he or she may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the buyer of certain restrictions on the receipt and possession of firearms. This form should only be used for sales or transfers where the seller is licensed under 18 U.S.C. § 923. The seller of a firearm must determine the lawfulness of the transaction and maintain proper records of the transaction. Consequently, the seller must be familiar with the provisions of 18 U.S.C. §§ 921-931 and the regulations in 27 CFR Part 478. In determining the lawfulness of the sale or delivery of a long gun *(rifle or shotgun)* to a resident of another State, the seller is presumed to know the applicable State laws and published ordinances in both the seller's State and the buyer's State.

After the seller has completed the firearms transaction, he or she must make the completed, original ATF Form 4473 *(which includes the Notices, General Instructions, and Definitions)*, and any supporting documents, part of his or her permanent records. Such Forms 4473 must be retained for at least 20 years. Filing may be chronological *(by date)*, alphabetical *(by name)*, or numerical *(by transaction serial number)*, as long as all of the seller's completed Forms 4473 are filed in the same manner. FORMS 4473 FOR DENIED/CANCELLED TRANSFERS MUST BE RETAINED: If the transfer of a firearm is denied/cancelled by NICS, or if for any other reason the transfer is not complete after a NICS check is initiated, the licensee must retain the ATF Form 4473 in his or her records for at least 5 years. Forms 4473 with respect to which a sale, delivery, or transfer did not take place shall be separately retained in alphabetical *(by name)* or chronological *(by date of transferee's certification)* order.

If you or the buyer discover that an ATF Form 4473 is incomplete or improperly completed after the firearm has been transferred, and you or the buyer wish to make a record of your discovery, then photocopy the inaccurate form and make any necessary additions or revisions to the photocopy. You only should make changes to Sections B and D. The buyer should only make changes to Sections A and C. Whoever made the changes should initial and date the changes. The corrected photocopy should be attached to the original Form 4473 and retained as part of your permanent records.

Over-the-Counter Transaction: The sale or other disposition of a firearm by a seller to a buyer, at the seller's licensed premises. This includes the sale or other disposition of a rifle or shotgun to a nonresident buyer on such premises.

State Laws and Published Ordinances: The publication (ATF P 5300.5) of State firearms laws and local ordinances ATF distributes to licensees.

Exportation of Firearms: The State or Commerce Departments may require you to obtain a license prior to export.

Section A

Question 1. Transferee's Full Name: The buyer must personally complete Section A of this form and certify *(sign)* that the answers are true, correct, and complete. However, if the buyer is unable to read and/or write, the answers *(other than the signature)* may be completed by another person, excluding the seller. Two persons *(other than the seller)* must then sign as witnesses to the buyer's answers and signature.

When the buyer of a firearm is a corporation, company, association, partnership, or other such business entity, an officer authorized to act on behalf of the

4-7-16

TRANSFER OF A FIREARM TO AN OUT-OF-STATE CUSTOMER

Academy allows the transfer of long guns to residents of other states. The transfers require the Team Member to review the Long Gun Transfer map for guidance. Some states require additional paperwork for the legal transfer.

Residents of Illinois may purchase a long gun out of state. The customer must present their FOID (Firearm Owners Identification) or Illinois Concealed Carry License. At least one of these cards is required for transfer and in no ways exempts a resident of Illinois from the background check. After the background check is submitted, the resident is put on a 24 hour wait period and must receive a proceed response.

Handguns, Pistol-Grip firearms, and receivers are NOT permitted for transfer to non-residents of the state in which your store is located.

FIREARM DENIALS

Academy takes the transfer of firearms very seriously. Our goal is to provide all legally eligible customers with the opportunity to purchase the firearm(s) of their choice. At the same time, we want to prevent the transfer of firearms to customers who are ineligible to own such firearms or who are purchasing firearms for an illegal purpose. Although most firearm transactions are straight forward, there are situations which require Academy personnel to deny a firearm transfer based on the actions of the customer. These actions may include, but are not limited to, the following:

- NICS/POC Denials
- Potential straw sales
- Transfer of the firearm would allow a firearm to be present in a prohibited persons household
- Suspected intoxication
- Nervous or suspicious behavior
- Suspected to be under the influence of illegal drugs
- Exhibiting aggressive behavior
- Exhibiting odd behavior
- Used language that threatened themselves or others
- Incorrect response to qualifying questions 11A – 11I, 12B-C
- Phone call from a concerned party

PROCEDURE FOR REPORTING A FIREARM DENIAL

The following guidelines must be used when denying a firearm transfer:

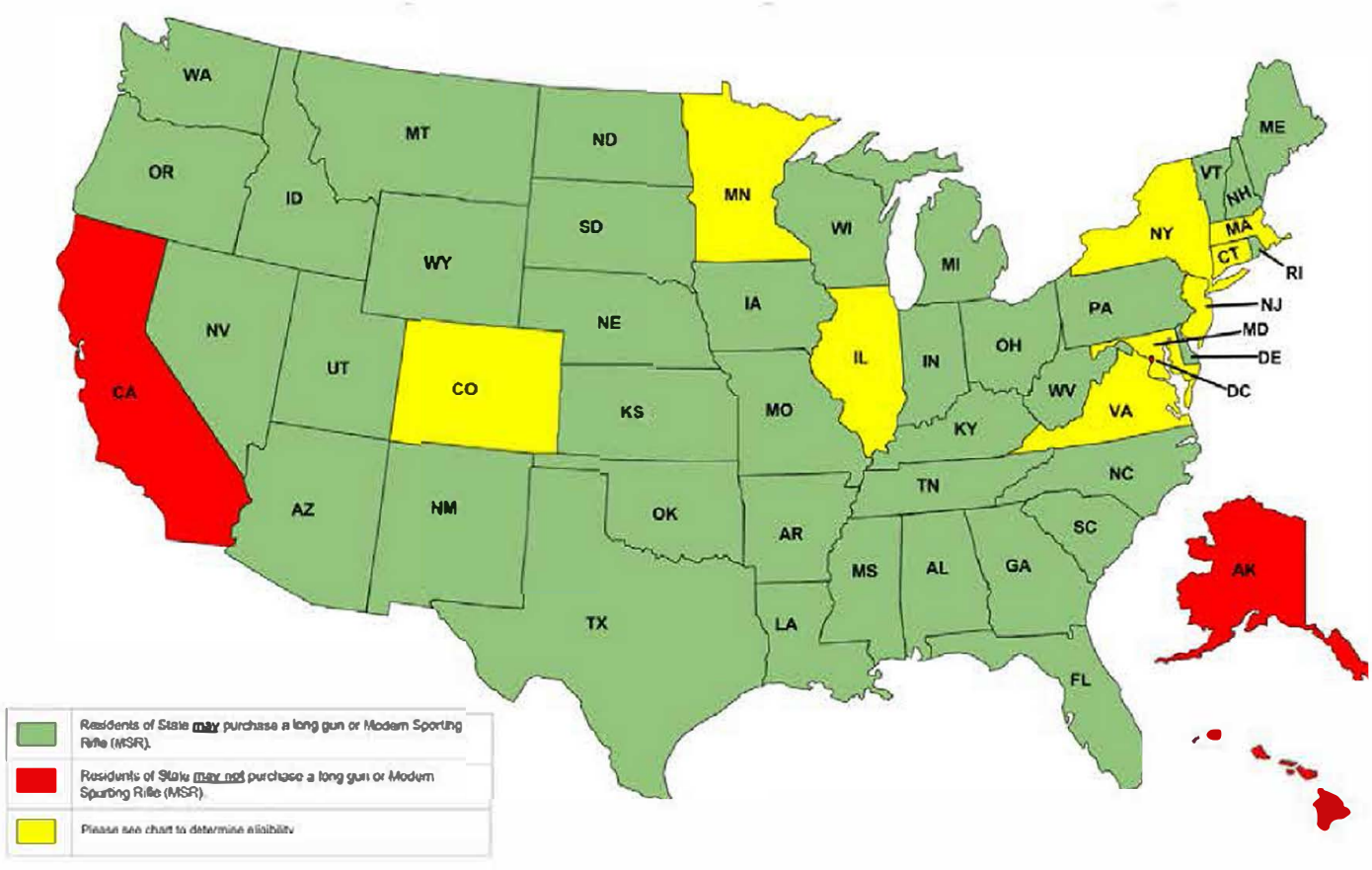
1. Obtain customer's identification prior to denying the firearm transfer. The information gathered from the ID is essential documentation needed to properly identify the prohibited customer if he/she tries to purchase a firearm at another Academy location. The identification type and number must be documented on the Firearm Transaction Checklist prior to the denial.
2. Discreetly inform the customer of the denial using the script below:

   "At this time, Academy will not be able to complete this firearm transaction because _____ (reason for denial)."

   Please remember when you are denying a firearm transfer for any reason, convey the following information to:

   a. Tell the customer they are being denied. Remember to be discreet as some of the denial reasons are sensitive in nature.
      - e.g., "At this time, you answered 11C "yes." Flip the Form 4473 to page two and show the customer the portion of the paragraph above his/her signature that states that a person that answers "yes" to 11B – 11I, 12B-C is prohibited from purchasing or receiving a firearm.

LONG GUN/MSR PURCHASE MAP



Handguns, Pistol Grip Firearms, and Receivers may only be transferred to In-State Residents that are 21 years of age or older.

	May residents of these states purchase LONG GUNS in this store?	May residents of these states purchase MODERN SPORTING RIFLE (MSR) in this store?
California (CA)	NO	NO
District of Columbia (DC)	NO	NO
Hawaii	NO	NO
Alaska	NO	NO
Colorado (CO)	YES	YES - **exception Denver residents can not purchase MSR's**
Connecticut (CT)	YES - **Two Week Waiting** period required	NO
Illinois (IL)	YES -FOID Card† and **24 Hour Wait** period required*	YES - FOID† Card and **24 Hour Wait** period required - **exception Cook County residents cannot purchase MSR's***
Maryland (MD)	YES	NO
Massachusetts (MA)	YES	NO
Minnesota (MN)	YES	YES - vaild MN Permit to Purchase/Transfer†*
New Jersey (NJ)	YES - NJ FID Card* and NJ Certificate of Eligibility Form required*	NO
New York (NY)	YES - **exception New York City residents within 5 NYC boroughs cannot purchase long guns.** Manhattan, The Bronx, Queens, Brooklyn, Staten Island	NO
Virginia (VA)	YES	NO

†Refer to the back for images
*Any questions concerning the sale of a firearm to an out-of-state resident should be sent to firearmcompliance@academy.com

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*CONTAINS SENSITIVE DATA

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF R.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR;	IN THE DISTRICT COURT
Plaintiffs,	
vs.	
ACADEMY, LTD D/B/A ACADEMY SPORTS + OUTDOORS,	
Defendants.	BEXAR COUNTY, TEXAS
	224TH JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION

[redacted]

NOVEMBER 13, 2018

ORAL and VIDEOTAPED DEPOSITION OF [redacted] produced as a witness at the instance of certain Plaintiffs, and duly sworn, was taken in the above-styled and numbered cause on November 13, 2018, from 9:33 a.m. to 11:43 a.m., before LISA A. BLANKS, CSR, in and for the State of Texas, reported by machine shorthand, at Norton Rose Fulbright US LLP, 300 Convent Street, Suite 2100, San Antonio, Texas, 78205, pursuant to the Texas Rules of Civil Procedure and the provisions stated on the record.

same sentence as frame or receiver?

MS. MILITELLO: Objection, form.

THE WITNESS: It's in the same sentence.

Q. BY MR. LeGRAND: It's in the same sentence; isn't it? Yes?

A. Yes.

Q. So would you agree that 27CFR53.61, section 5, Roman numeral II, says that the magazine that comes in this box from Ruger is a component part of the firearm?

MS. MILITELLO: Objection, form.

Q. BY MR. LeGRAND: Does this say that?

MS. MILITELLO: Objection, form.

THE WITNESS: I have -- the knowledge I have for this part of the operation, we're depending on our firearm compliance or our buyers.

Q. BY MR. LeGRAND: All I asked you was does this say that?

A. Yes, it does.

MS. MILITELLO: Objection -- let me get my objection in, please.

Objection, form.

Q. BY MR. LeGRAND: Does this say that?

MS. MILITELLO: Objection, form.

THE WITNESS: Yes.

Q. BY MR. LeGRAND: And then iii -- in other

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF R.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR;	)	IN THE DISTRICT COURT
Plaintiffs,	)	
vs.	)	
ACADEMY, LTD D/B/A ACADEMY SPORTS + OUTDOORS,	)	
Defendants.	)	BEXAR COUNTY, TEXAS
	)	224TH JUDICIAL DISTRICT

REPORTER'S CERTIFICATION
VIDEOTAPED AND ORAL DEPOSITION OF
[redacted]
November 13, 2018

I, LISA A. BLANKS, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, [redacted] was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on 11-30-18 to the witness or to the attorney for the witness for examination, signature and return to me by 12-20-18;

That the amount of time used by each party at the deposition is as follows:

George LeGrand - 1 hours, 45 minutes

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for parties of record:

For the Plaintiffs Rosanne Solis and Joaquin Ramirez:

LeGRAND & BERNSTEIN
BY: GEORGE LEGRAND, ESQ.
BY: STANLEY BERNSTEIN, ESQ.
2511 North St. Mary's Street
San Antonio, Texas 78212-3760
210.733.9439
assistant@legrandandbernstein.com

For the Plaintiffs Dalia Lookingbill, et al:

THE WEBSTER LAW FIRM
BY: JASON C. WEBSTER, ESQ.
6200 Savoy Drive, Suite 150
Houston, Texas 77036
713.581.3900
jwebster@thewebsterlawfirm.com

BRADY CENTER TO PREVENT GUN VIOLENCE
BY: ERIN DAVIS, ESQ. (appeared via telephone.)
BY: ROBERT CROSS, ESQ.
BY: JONATHAN LOWY, ESQ.
840 First Street, NE, Suite 400
Washington, DC 20002
202.370.8106
edavis@bradymail.org
rcross@bradymail.org

For the Plaintiffs Chancie McMahan, Individually and as Next Friend of R.W., a minor; Roy White, Individually and as Representative of the Estate of Lula White; and Scott Holcomb:

THOMAS J. HENRY
BY: MARCO CRAWFORD, ESQ.
4715 Fredericksburg Rd., Suite 507
San Antonio, Texas 78229
210.656.1000
mcrawford@tjhlaw.com

For the Plaintiffs Chris Ward, individually and as next friend of Ryland Ward and for the estates of Joann Ward and Brooke Ward:

ANDERSON & ASSOCIATES LAW FIRM
BY: KELLY KELLY, ESQ.
2600 SW Military Drive, Suite 118
San Antonio, Texas 78224
210.928.9999
kk.aalaw@yahoo.com

For the Intervenor Mr. Braden:

O'HANLON DEMERATH & CASTILLO
BY: JUSTIN B. DEMERATH, ESQ.
808 West Avenue
Austin, Texas 78701
512.494.9949
jdemerath@808west.com

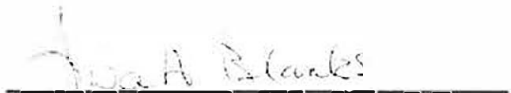
For the Defendant Academy Ltd., Sports + Outdoors:

LOCKE LORD LLP
BY: JANET E. MILITELLO, ESQ.
600 Travis, Suite 2800
Houston, Texas 77002
713.226.1208
jmilitello@lockelord.com

I further certify that I am not related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further, that I am not financially or otherwise interested in the outcome of the action.

Further certification requirements pursuant to Rule 203 of TRCP will be certified to after they have occurred.

Certified to by me this 14th day of November, 2018.



LISA A. BLANKS, RPR, CRR, CSR
Certification Number: 4266
Certification Expiration 12/31/18
Firm No. 10766
Paszkiewicz Court Reporting
39 Executive Plaza Court
Maryville, IL 62062

FURTHER CERTIFICATION UNDER RULE 203 TRCP

The ~~original deposition~~/signature page (copy) was/was not returned to the deposition officer on 12-14-18;

If returned, the attached Changes and Signature page contains any changes and the reasons therefor;

If returned, the original deposition was delivered to N/A, Custodial Attorney;

That $1351.38 is the deposition officer's charges to the Plaintiff for preparing the original deposition transcript and any copies of exhibits;

That the deposition was delivered in accordance with Rule 203.3, and that a copy of this certificate was served on all parties shown herein on 1-31-19 and filed with the Clerk.

Certified to by me this 31st day of January, 2019.

Lisa A. Blanks

LISA A. BLANKS, RPR, CRR, CSR
Certification Number: 4266
Certification Expiration 12/31/18
Firm No. 10766
Paszkiewicz Court Reporting
39 Executive Plaza Court
Maryville, IL 62062

[redacted]

November 13, 2018

I, [redacted] have read the foregoing deposition and hereby affix my signature that same is true and correct, except as noted above.

[redacted]

THE STATE OF Texas)
COUNTY OF Bexar)

Before me, Theresa E Garza on the day personally appeared [redacted], known to me (or proved to me under oath or through TXDL) (description of identity card or other document), to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 5 day of December, 2018.

THERESA E GARZA
Notary Public, State of Texas
My Comm. Exp. 03-20-2022
ID No. 13149530-9

Theresa E. Garza

NOTARY PUBLIC IN AND FOR THE STATE OF Texas
MY COMMISSION EXPIRES: 3/20/2022

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*CONTAINS SENSITIVE DATA

TRANSACTION DISPLAY

ESCAPE™
EDJ Enterprises, Inc.

Date:	4/7/2016	**Register:**	202	**Number:**	3949
Store:	0041	**Cashier:**	348728	**Total:**	$822.12

Bracket: None

```
----------------------------------------
     348728 SALE          3949 0041 202
VERIFIED AGE 02
KELLEY                DEVIN
103530047*             MDS 1     699.99
SERIAL # 852-06623
23912389*              MDS 1      15.99
26078436*              MDS 1      40.99
19517101*              MDS 1       2.49
              SUBTOTAL            759.46
   8.25% SALES TAX                 62.66
                TOTAL              822.12
   Cash                            840.00
              CHANGE                17.88
  Error in Request
  00124873900005902800118971100000000
                       4/07/16  17:15
```


EXHIBIT 11 tabbies

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Transaction Snapshot

Div-Store: 01-00041
Associate: 348728 [redacted]
Date-Time: 2016-04-07-17:15
Reg-Tran: 0202-0003949
Trans Type: Sale
Trans Amt: $822.12
Zip Code: 78132

SKU	Scan	Void	NonTax	Div	Cls	Vdr	Item Qty	Item Price	Discount	Ext Price	Cd
103530047 - Ruger AR-556 .223REM/5.56	☑	☐	☐	01	390	03387	1	$699.99	$0.00	$699.99	00
23912389 - PMAG M2 MOE 5.56 30RD WIN	☑	☐	☐	01	380	46736	1	$15.99	$0.00	$15.99	00
26078436 - 5.56 NATO 55GR 90RD M193:	☑	☐	☐	01	324	00971	1	$40.99	$0.00	$40.99	00
19517101 - 15"MARBLE BALLASST	☑	☐	☐	02	447	21215	1	$2.49	$0.00	$2.49	00
TRANSACTION TAX	☐	☐	☐				0	$62.66	$0.00	$62.66	00

Tender Summary:

Cash: ☑ Check: ☐ Cr/Db: ☐ Merch Credit: ☐ Other: ☐

Tender Type	Account Number	Amount	Scan
Cash	00000000000000000000000000	$840.00	☐
Cash	00000000000000000000000000	($17.88)	☐

Gladden v. Bangs

United States District Court for the Eastern District of Virginia, Norfolk Division

February 23, 2012, Decided; February 23, 2012, Filed

Civil Action No. 2:11cv378

Reporter
2012 U.S. Dist. LEXIS 23304 *; 2012 WL 604027

Norman Gladden, Petitioner, v. Gary Bangs, Director of Industry Operations, Respondent.

Subsequent History: Related proceeding at XVP Sports, LLC v. Bangs, 2012 U.S. Dist. LEXIS 132440 (E.D. Va., Mar. 21, 2012)

Affirmed by Gladden v. Bangs, 2012 U.S. App. LEXIS 22993 (4th Cir. Va., Nov. 7, 2012)

Core Terms

firearms, violations, licensee, instances, willfulness, license, warning, willful violation, indifference, genuine dispute, compliance, requirements, material fact, regulations, revocation, contends, reckless, summary judgment, transferrals, provisions, repeated, alleges, individuals, inspection, revoked, Notice, blank, summary judgment motion, repeated violations, transferring

Counsel: **[*1]** For Norman Gladden, Petitioner: Richard E. Gardiner, Law Office of Richard E. Gardiner, Fairfax, VA.

For Gary Bangs, Director of Industry Operations, Washington Field Division, Bureau of Alcohol, Tobacco, Firearms & Explosives, Respondent: Mark Anthony Exley, United States Attorney Office, Norfolk, VA.

Judges: Raymond A. Jackson, United States District Judge.

Opinion by: Raymond A. Jackson

Opinion

MEMORANDUM OPINION AND ORDER

Before the Court is Petitioner Norman Gladden's Petition ("the Petition") for *de novo* Judicial Review, pursuant to *18 U.S.C. § 923(f)(3)*. In opposition to the Petition, Respondent Gary Bangs, Director of Industry Operations (DIO), Washington Field Division, Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), filed a Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. [1] Having carefully considered the parties' pleadings, the Court finds that this matter is now ripe for judicial determination. For the reasons stated herein, Respondent's Motion for Summary Judgment is **GRANTED.**

I. FACTUAL AND PROCEDURAL HISTORY

Petitioner **[*2]** is a Federal Firearms Licensee ("licensee") located in Virginia Beach, Virginia. Resp.'s Mem. Law Supp. Mot. Summ. J. 2. On July 14, 2009, the ATF conducted a compliance inspection of Petitioner's premises. *Id.* ATF concluded that Petitioner had failed to properly maintain the Acquisition & Disposition ("A&D") Record for firearms in over one hundred instances, had transferred a firearm to a resident of another state in violation of federal law, had failed to report selling multiple handguns on three occasions, and failed to obtain a properly completed ATF form 4473 on numerous occasions. *Id.* On May 11, 2010, the ATF served Petitioner with a Notice of Denial of Application for License as a result of violations found during the investigation. Pet. Jud. Rev. ¶ 7. Petitioner subsequently requested and was granted a hearing pursuant to *18 U.S.C. § 923(f)(2)*. *Id.* ¶ 8. Petitioner's hearing was held on November 18, 2010 in Richmond, Virginia. *Id.* ¶ 9.

On May 31, 2011, Respondent issued a Final Notice of Denial of Application or Revocation of Firearms License ("Final Notice") to Petitioner. *Id.* ¶ 10. The Final Notice

[1] The reviewing court may grant summary judgment without conducting an evidentiary hearing if no genuine disputes as to material facts exist.

contained nine counts which detailed multiple violations of federal gun law. **[*3]** In Count I, Respondent states that Petitioner willfully violated: *18 U.S.C. § 922(d)(1)* by transferring a firearm to an individual who answered yes to Section A, 11(c) of ATF Form 4473 ("Have you ever been convicted in any court of a felony, or any other crime, for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence, including probation?"); *18 U.S.C. § 922(d)(4)* by transferring a firearm to an individual who answered yes to Section A, 11(f) of the ATF form 4473 ("Have you ever been adjudicated mentally defective OR have you ever been committed to a mental instituion?"); and *18 U.S.C. § 922(b)(3)* by transferring a firearm to an individual who was a resident of New Jersey in violation of New Jersey state law. *Id.* ¶ 12. Respondent claims that he did not violate these provisions because his actions were negligent, not knowing or reckless, as is required under these statutes. Pet. Jud. Rev. ¶¶ 13-16.

In Count II, Respondent alleges that Petitioner willfully violated *18 U.S.C. § 922(m)* and/or *§ 923(g)(3)(A)* by failing to report multiple sales on ATF Form 3310.4 (Multiple Sale or Other Disposition of Pistols and Revolvers) on three occasions **[*4]** involving six firearms. *Id.* ¶ 18. Petitioner contends that he did not knowingly or willfully violate these provisions because his actions were at most negligent, rather than deliberate. *Id.* ¶ 19. In Count III, Respondent lists violations of *18 U.S.C. § 922(m)* and/or *§ 923 (g)(1)(A)* and *27 C.F.R. § 478.125(e)*, specifically failure to record in an A&D Record the disposition of a firearm not later than seven days following the date of the transaction in 113 instances; failure to record in the A&D Record the acquisition of a firearm not later than the close of the next business day following the acquisition of the firearm in 62 instances; and failure to record in the gunsmith A&D Record full acquisition in 20 instances. *Id.* ¶ 21. Petitioner claims that in 31 instances, the firearm was erroneously recorded as an acquisition and thus was not subsequently disposed of, so there was no failure to record a disposition. *Id.* ¶ 22. As to the remaining counts, Petitioner concedes that he acted negligently but not knowingly, which does not constitute a violation of the statute.

In Count IV, Respondent alleges that Petitioner willfully violated *18 U.S.C. § 922(m)* and/or *§ 923(g)(1)(A)* and *27 C.F.R. § 478.21(a)* **[*5]** in that in thirty instances Items 31 ("Trade/corporate name and address of transferor"), 32 ("Federal Firearms License Numbers"), 33 ("Transferor's/Seller's Name"), and 35 ("Transferor's/Seller's Title") were blank or incomplete. *Id.* ¶ 28. In three instances, the response to Item 11a ("Are you the actual transferee/buyer of the firearm(s) listed on this form?") was no. *Id.* Petitioner claims he did not violate these provisions because no regulation requires the licensee to record the aforementioned information. Pet. Jud. Rev. ¶ 32-33. Petitioner also alleges that he acted negligently, not willfully, and thus was not in violation of the statute.

In Count V, Respondent avers that Petitioner willfully violated *18 U.S.C. § 923(g)(1)(A)* and *27 C.F.R. § 478.124(c)(1)* for failure to complete, or ensure the proper completion of, ATF forms in the following manner: two instances of transferrals to individuals who did not completely answer Item 2 (Current Residence Address) on ATF Form 4473, one instance of transferral to an individual who did not completely answer Item 3 (Place of Birth) on ATF form 4473, seven instances of transferrals to individuals who answered Item 7 with the current year **[*6]** instead of the purchaser's birth year, five instances of transferrals of firearms to individuals who left Items 4 (height), 5 (weight), 6 (gender), 7 (birth date), or 10 (race) blank, seven instances of transferrals of firearms to an individual who left Items 11i, 11j, and 11k blank, thirty-three instances of transferrals of firearms to individuals who left Items 16 (Transferree's/Buyer's signature) or 17 (Certification Date) blank, two instances of transferrals of firearms to individuals who left Item 14 ("What is your country of citizenship") blank, and two instances in which Item 13 was incorrectly completed as "N/A" or "CA". *Id.* ¶¶ 38(a-h). Petitioner contends that he did not violate these provisions because his actions were not intentional, knowing, or reckless. *Id.* ¶ 39.

In Count VI, Respondent states that Petitioner willfully violated *18 U.S.C. § 922 (m)* and/or *923 (g) (1) (A)* and *27 C.F.R. § 478.124 (c) (3) (i)* in three instances by incorrectly recording the date of birth for the transferee instead of the expiration date for the identification in Item 20(a). *Id.* ¶ 41. Petitioner claims Form 4473 does not require that the expiration date for the identification be noted. Thus, **[*7]** Petitioner believes he did not violate the provision. In Count VII, Respondent asserts that Petitioner willfully violated *18 U.S.C. § 922(m)* and/or *§ 923(g)(1)(A)*, and *27 C.F.R. § 478.124 (c)(3)(ii)* in one instance by failing to complete Item 20(c) on the ATF form 4473 when transferring to an alien. *Id.* ¶ 46. In Count VIII, Respondent alleges that Petitioner willfully violated *18 U.S.C. § 922(m)* and/or *923(g)(1)(A)*, and *27 C.F.R. § 478.124 (c)(3)(iv)* in nineteen instances by failing to record information in Items 21(a-d), and in one instance by not completely answering Item 21(b). *Id.* ¶

53. Lastly, in Count IX, Respondent charges that Petitioner willfully violated *18 U.S.C. § 922(m)* and/or *§ 923(g)(1)(A)*, and *27 C.F.R. § 478.124 (c)(5)* by leaving Items 34 and 36 blank in sixteen instances and by not completely answering Item 34 in two instances. *Id.* ¶ 56. For all of these allegations, Petitioner denies having requisite willfulness to constitute violations of these provisions.

II. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant **[*8]** is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *see also McKinney v. Bd. of Trustees of Maryland Cmty. Coll., 955 F.2d 924, 928 (4th Cir. 1992)* ("[S]ummary judgments should be granted in those cases where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not necessary to clarify the application of the law.") (citations omitted). In deciding a motion for summary judgment, the court must view the facts, and inferences to be drawn from the facts, in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

Once a motion for summary judgment is properly made and supported, the opposing party "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita, 475 U.S. at 586-87* (internal quotations omitted). Summary judgment will be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

Petitioner **[*9]** is appealing the ATF's decision to revoke Petitioner's federal firearms license. *See 18 U.S.C. § 923(f)(3)*. Under this section, petitioners are afforded *de novo* judicial review in federal district court. However, because it is duly authenticated, an administrative record enjoys a presumption of verity. *Langston v. Johnson, 478 F.2d 915, 917-918, 156 U.S. App. D.C. 5 (D.C. Cir. 1973)*. The reviewing court can consider any evidence submitted by the parties regardless if such evidence was included in the administrative hearing. The non-moving party may not simply rely upon the mere allegations of his complaint. *Best Loan Co. v. Herbert, 601 F.Supp.2d 749, 753 (E.D. Va. 2009)*. Instead, his response must, through affidavits or other evidence, detail specific facts showing a genuine dispute for trial. *Id.* The reviewing court can grant summary judgment without conducting an evidentiary hearing if no genuine disputes of material fact exist. *Dimartino v. Buckles, 129 F.Supp.2d 824, 827 (D. Md. 2001)*, *aff'd by unpublished order, Dimartino v. Buckley, 19 Fed. Appx. 114, 2001 WL 1127288, at *1 (4th Cir. 2001)*; *see also T.T. Salvage Auction Co. v. United States Treasury Dep't, 859 F.Supp. 977, 979 (E.D.N.C. 1994)*; **[*10]** *Al's Loan Office, Inc., v. Bureau of Alcohol, Tobacco, and Firearms, 738 F. Supp. 221, 223 (E.D. Mich. 1990)*.

III. DISCUSSION

Respondent claims he should be awarded summary judgment, as there are no genuine disputes as to material facts. Respondent's main assertion is that DIO Bangs revoked Petitioner's license after evidence at the Federal Firearms License revocation hearing established that Petitioner knew and understood the requirements of record keeping under the Gun Control Act ("GCA"), yet nonetheless had multiple violations under the GCA upon inspection. Resp.'s Mem. Supp. Mot. Summ. J. 1. Respondent contends that the United States Fourth Circuit Court of Appeals ("Fourth Circuit"), amongst many courts, has held that a single violation of the GCA is sufficient grounds for revocation of an license. *Id.* at 1-2.

Petitioner contends that there is a genuine dispute as to material fact regarding the alleged wilfulness of Petitioner's actions. Pet.'s Opp. Resp. Mot. Summ. J. 1. Petitioner bases this contention on the Affidavit of Tim Donaldson. Donaldson asserts that none of the violations were committed willfully. Petitioner believes that Donaldson's affidavit "affirmatively shows that **[*11]** the violations were not the result of recklessness . . . while ordinary care may not have been exercised, the actions were not deliberate, knowing, or reckless because it was not an extreme departure from the standard of ordinary care." *Id.* at 5. Therefore, Petitioner concludes that Respondent has failed to show that Petitioner behaved recklessly or willfully during the alleged violations, as is necessary under the GCA. *Id.* at 2. Furthermore, Petitioner claims that Respondent relies on the commission of acts years earlier, rather than proving the Petitioner's willfulness or recklessness at the time of the violations. *Id.* at 4.

A. Willfulness Under the GCA

The Fourth Circuit has defined willful under *18 U.S.C. § 923(d)(1)(C)* as ". . . action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision properly is described as willful, 'regardless of venal motive.'" *American Arms Int'l v. Herbert, 563 F.3d 78, 83 (4th Cir. 2009)* (citing *Prino v. Simon, 606 F.2d 449, 450 (4th Cir. 1979)).* The court in *American Arms Int'l* further stated that the defendant **[*12]** need not have knowledge of the law which he is accused of violating, "[r]ather a more general knowledge 'that the conduct is unlawful is all that is required.'" *Id.* (quoting *Bryan v. United States, 524 U.S. 184, 196, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998)).* Further, in the context of omissions or failures to act, a court may infer willfulness from a licensee's plain indifference to a legal requirement to act if the licensee (1) knew of the requirement *or* (2) knew generally that his failure to act would be unlawful. *Best Loan Co. v. Herbert, 601 F.Supp.2d 749, 754 (E.D. Va. 2009)* (citing *Lewin v. Blumenthal, 590 F.2d 268, 269 (8th Cir. 1979)).*

The Fourth Circuit has acknowledged that some mistakes or omissions are attributable to human error, and thus fall below the requisite level of willfulness. *American Arms Int'l., 563 F.3d at 84* (citing *RSM, Inc. v. Herbert, 466 F.3d 316, 322 (4th Cir. 2006)* (stating there is a measure of normal human error in terms of GCA compliance that can fall below willfulness)). However, at some point, when errors continue to increase in the face of repeated warnings by enforcement officials, a court may infer *as a matter of law* that the licensee has disregarded the legal requirements and **[*13]** thus his plain indifference constitutes willfulness. *Id. at 85* (citing *RSM, Inc. 466 F.3d at 322*).

1. Petitioner's Knowledge of Federal Firearms Requirements

In the instant case, Petitioner has worked over 30 years in the firearms industry and has been a licensee since October of 1997. Resp.'s Mem. Supp. 8. Respondent states that on October 6, 2000, ATF Inspector Rouse "thoroughly explained" firearm regulations to Petitioner, which Petitioner acknowledged. *Id.* Respondent contends Investigator Michael Adkins further explained these provisions to Petitioner on November 27, 2002 and again on June 16, 2005. *Id.* at 9. Respondent asserts that acknowledgments Petitioner signed are evidence of these exchanges. *Id.* These exchanges show *at the very least* Petitioner's knowledge of the compliance requirements under the GCA. *See Target Sporting Goods, Inc. v. Attorney Gen. of the U.S., 472 F.3d 572, 575 (8th Cir. 2007)* ("For the government to prove a willful violation of the federal firearms statutes, it need only establish that a licensee knew of its legal obligation and purposefully disregarded *or* was plainly indifferent to the record-keeping requirements.") (emphasis added).

In 2006, subsequent **[*14]** to Petitioner's signed acknowledgments, ATF conducted a compliance inspection at 2664 Lishelle Place, Virginia Beach, where Petitioner was President. Resp.'s Mem. Supp. 9. Petitioner was cited for disposal of weapons to any person when having knowledge or reasonable cause to believe that such person is prohibited from possession of a firearm, failure to report multiple sales, failure to maintain complete and accurate ATF Forms 4473, and failure to maintain an A&D record. *Id.* An ATF area supervisor held a Warning Conference with Petitioner, in which Petitioner attributed the violations to employee error. *Id.* On July 14, 2009, ATF conducted another compliance inspection in which numerous violations were again found. *Id.* at 2. Petitioner attributed these violations to human error as well. *Id.* Finally, on May 31, 2011, after a November 18, 2010 hearing, Petitioner was served with the Final Notice of Application or Revocation of Firearms License for Shooting Sports Distributors, Inc.

Petitioner has been a licensee for several years, acknowledged federal inspections, committed previous violations, and attended an explicit warning conference for the very violations contained in the instant **[*15]** case. From these facts, the Court reasons that Petitioner has clear knowledge of federal firearms law. *See, e.g., American Arms Int'l, 563 F.3d at 87* ("The string of prior citations, warning letters, and regulatory review sessions were clearly not enough to bring Gilbert into compliance. We have no trouble finding in these circumstances that Gilbert's violations of the GCA were willful."). Further, the aforementioned facts coupled with Petitioner's other citations for the violations contained in this case, indicate at the very least that Petitioner understood his noncompliance was in violation of federal law. *American Arms Int'l, 563 F.3d at 85* ("At some point . . . repeated failure to comply with known regulations can move a licensee's conduct from inadvertent neglect into reckless or deliberate disregard (and thus willfulness)."). It is clear to the Court that

Petitioner was aware of his responsibilities as a firearms licensee.

2. Petitioner's Plain Indifference to Federal Firearm Requirements

Of the multiple violations cited, Petitioner had been advised of *nine similar violations* under a previous license. *Id.* at 10 (citing Hearing Transcript 153-156). Petitioner contends that previous **[*16]** violations do not amount to willfulness for the allegations here because there remains a genuine dispute as to material fact concerning Petitioner's state of mind. Pet.'s Mem. Opp. 4 ("[T]o show recklessness, it is implicit that there must be proof of the actor's state of mind at the time of the violation; the commission of acts years earlier is not probative."). Courts have held that repeated violations, which were specifically cited in previous warning conferences, can amount to willfulness under at least a plain indifference standard. *American Arms, 563 F.3d at 87* ("Plain indifference can be found where nine times out of ten a licensee acts in accordance with the regulations, if he was plainly indifferent to the one-in-ten violation."); *RSM, Inc., 466 F.3d at 322* ("The violations cited in the previous inspections and . . . warning conferences are repeat violations . . . this clearly meets the level of at least plain indifference."); *Best Loan Co., 601 F.Supp.2d at 755* ("Best Loan's repeated violations, after it had been informed of the regulations, warned of its offenses, and afforded additional opportunities . . . leads this court to conclude that the company has shown 'deliberate **[*17]** disregard' and 'plain indifference' towards its obligations, and, thus, its violations were willful.").

Petitioner's contention that previous acts do not establish willfulness is patently false. This Court, among various other circuit and district courts, has found that "[a] firearms licensee's 'repeated violations after it has been informed of the regulations and warned of violations does show purposeful disregard or plain indifference,' for purposes of determining whether such violations are willful." *Best Loan, 601 F.Supp.2d at 754* (citing *Willingham Sports, Inc. v. Bureau of A.T.F., 415 F.3d 1274, 1277 (11th Cir. 2005)*); *accord Appalachian Res. Dev. Corp., v. McCabe, 387 F.3d 461, 464 (6th Cir. 2004)*. Indeed, a majority of courts have consistently held that if a licensee understands his legal obligations under the GCA and fails to abide by those requirements, his license can be denied or revoked based on willful violation. *Best Loan, 601 F.Supp.2d at 754*; *See Perri v. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms, 637 F.2d 1332, 1336 (9th Cir. 1981)*; *Stein's Inc. v. Blumenthal, 649 F.2d 463, 467 (7th Cir. 1980) Lewin v. Blumenthal, 590 F.2d 268, 269 (8th Cir. 1979))*; *Prino v. Simon, 606 F.2d 449, 451 (4th Cir. 1979)*; **[*18]** *Dimartino v. Buckles, 129 F.Supp.2d 824, 827 (D. Md. 2001), aff'd by unpublished order, Dimartino v. Buckley, 19 Fed. Appx. 114, 2001 WL 1127288, at *1 (4th Cir. 2011).*

Here, Petitioner was previously cited for nine of the violations contained in this action. He had accumulated hundreds of violations under the A&D records provision despite being cited for these violations previously. Petitioner's actions are indistinguishable from the licensees in *American Arms* and *Prino* in which those individuals' licenses were revoked based on repeated offenses. In fact, the licensee in *Prino* had around 20 years experience and was missing 92 weapons, almost identical to Petitioner's 30 years experience and 113 missing weapons. *606 F.2d at 450*. The Court upheld the ATF's findings and denied the licensee's Petition for Judicial Review. *American Arms* also involved a licensee who had insufficient recordings of transactions and who subsequently ameliorated some of the mistakes. Yet, again, the repeated violations necessitated revocation of the license without an additional evidentiary hearing. *563 F.3d at 86* ("[A]t some point, when a licensee received official warning that his actions violate the GCA **[*19]** and his record of compliance does not change...it is permissible to infer 'willfulness'."). Based on Petitioner's undisputed knowledge of previous violations of firearm regulations and ATF warnings, the Court finds that the record supports the revocation of Petitioner's firearm license for willful violations.

B. A Single Violation is Sufficient to Revoke a License

There is no genuine dispute as to material fact concerning Petitioner's willful intent to disregard the compliance requirements of the GCA. Petitioner was clearly informed of the applicable federal firearms law, yet was plainly indifferent in compliance with them. As further support for the Court's conclusion, a single violation of the GCA is a sufficient basis for denying an application or revoking a firearms license. *Armalite, 544 F.3d at 649*. In his Petition for Judicial Review, Petitioner concedes almost all factual findings, including, but not limited to, over 100 instances of failure to record in an A&D Record the disposition of a firearm not later than seven days following the transaction. Pet.

Jud. Rev. ¶ 21; *see also* Armalite, 544 F.3d at 650 ("Because a single violation suffices, we need not scour each charge in the **[*20]** ATF's revocation notice.").

Petitioner's only challenge is to the interpretation of "willfulness" which, as shown above, is meritless. The Court is not required to determine the validity of all Petitioner's ATF violations. *See* American Arms Int'l, 563 F.3d at 86 (finding that because Defendant did not raise issues of genuine dispute for a number of violations, summary judgment was appropriate). Petitioner has clearly conceded more than one violation with a record which reflects willfulness. Therefore, the Court is fully justified in granting Respondent's motion for summary judgment without an evidentiary hearing.

C. A Licensee is Responsible for Record Keeping Violations by Employees

Finally, Petitioner contends that there remains a genuine dispute as to material fact concerning the alleged violations because Respondent has failed to prove that Petitioner *himself* committed any of the violations. Pet. Mem. Opp. 4 ("Bangs has also not pointed to any evidence that Gladden committed any of the violations which were the basis of the revocation of the license of Shooting Sports Distributors, Inc."). Rather, Petitioner contends that the corporation's unlawful acts should not be attributed to **[*21]** an officer simply because of his title. *Id.* at 5.

Petitioner's contention is without merit and in direct conflict with this and other courts' interpretation of federal firearms law. When an employer is knowledgeable of his employees' repeated failures to comply with federal firearms law, the conduct is directly attributable to the employer. Armalite, 544 F.3d at 650 ("Although it knew that its employees were not fully and accurately completing the forms, Armalite chose not to take steps to ensure future compliance. At some point, repeated negligence becomes recklessness."). The employer's knowledge in *Armalite* came from repeated offenses and warnings from the ATF, nearly identical to the Petitioner's offenses. Id. at 649 (concluding that the previous warnings and citations of violations were evidence that the employer was knowledgeable about employees' errors, and thus culpable). Petitioner, as President of the corporation, is culpable for the conduct of his employees. Stein's, Inc. v. Blumenthal, 649 F.2d 463, 468 (7th Cir. 1980) ("[W]here, as here, the licensee is a corporation, it is chargeable with the conduct and knowledge of its employees."). Here, Petitioner had full knowledge **[*22]** and warnings about repeated violations of federal firearms regulations in his company. Therefore, Petitioner cannot escape liability by asserting that he was not responsible for his employees' actions.

V. CONCLUSION

For the reasons stated above, Respondent's Motion for Summary Judgment, pursuant to Federal Rule of Civil Procedure 56 is **GRANTED**.

The Clerk is **DIRECTED** to send a copy of this Order to the parties.

IT IS SO ORDERED.

/s/ Raymond A. Jackson

Raymond A. Jackson

United States District Judge

Norfolk, Virginia

February 23, 2012

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Barany v. Van Haelst

United States District Court for the Eastern District of Washington

December 6, 2010, Decided; December 6, 2010, Filed

NO: CV-09-253-RMP

Reporter
2010 U.S. Dist. LEXIS 128290 *; 2010 WL 5071053

BRUCE R. BARANY, Plaintiff, v. JANET C. VAN HAELST, Acting Director of Industry Operations, Seattle Division, Bureau of Alcohol, Tobacco, Firearms & Explosives, et al., Defendants.

Subsequent History: Affirmed by *Barany v. Van Haelst, 2011 U.S. App. LEXIS 21693 (9th Cir. Wash., Oct. 25, 2011)*

Prior History: *General Store, Inc. v. Van Loan, 560 F.3d 920, 2009 U.S. App. LEXIS 7873 (9th Cir. Wash., 2009)*

Core Terms

firearms, license, Gun, willful violation, revocation, summary judgment, inspection, regulations, violations, district court, revoked, license application, willfulness, provisions, licensee, dealers, administrative record, Notice, statute of limitations, judicial review, indifference, proceedings, requires, resident, applies, records

Counsel: **[*1]** For Bruce R Barany, Plaintiff: Thomas Milby Smith, LEAD ATTORNEY, Thomas Smith Law Office, Spokane, WA.

For Janet C Van Haelst, Acting Director of Industry Operations Seattle Field Division Bureau of Alcohol Tobacco Firearms and Explosives, Defendant: Rolf H Tangvald, LEAD ATTORNEY, U S Attorney's Office - SPO, Spokane, WA.

Judges: ROSANNA MALOUF PETERSON, United States District Court Judge.

Opinion by: ROSANNA MALOUF PETERSON

Opinion

ORDER ADDRESSING MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the court on cross-motions for summary judgment by Plaintiff Bruce Barany and Defendant the United States of America on behalf of its agency the Department of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, and its employees (hereinafter the "United States" or "ATF") (Ct. Recs. 16 and 29). Mr. Barany's complaint seeks judicial review of the ATF's denial of his application for a license to deal in firearms (Ct. Rec. 1). In Ct. Rec. 16, Mr. Barany seeks summary judgment in his favor and an order requiring the United States to withdraw its denial of his application and issue him a federal firearms dealer's license. The United States seeks summary judgment in its favor and an order dismissing Mr. Barany's **[*2]** complaint (Ct. Rec. 29).

BACKGROUND

The following facts are undisputed and are based on documents in the certified administrative record (cited as "AR"), which was filed on February 11, 2010, and contains all of the evidence referenced by either party in this matter. *See* (Ct. Rec. 15) (Certificate of Service for filing of administrative record under seal); (Ct. Rec. 43) (Docket entry for administrative record).

Bruce Barany is president and one of two corporate officers of The General Store, Inc. ("The General Store"), a retail business in Spokane, Washington, that sells sporting goods, along with a wide variety of general merchandise.

License Revocation

At some point prior to 2004, The General Store secured a federal firearms dealers license to sell firearms and ammunition. The General Store's license was revoked in administrative proceedings beginning in 2004 because it

was found to have violated two provisions of the Gun Control Act of 1968, codified at *18 U.S.C. §§ 921-930* ("Gun Control Act").[1]

First, federal firearms licensees must adhere to specific record keeping requirements under the Gun Control Act, including maintaining "such records of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe." *18 U.S.C. § 923(g)(1)*. The regulations, in turn, require licensed firearms dealers to "enter into a record each receipt and disposition of firearms." *27 C.F.R. § 478.125(c)*. The regulations prescribe a particular form for recording the receipt and disposition of firearms called a "Firearms Acquisition and Disposition Record" that has ten different fields of information to be completed. *27 C.F.R. § 478.125(c)*.

Second, licensed firearms dealers may not transact business in a way that violates state law. *18 U.S.C. § 922(b)(2)*. The Attorney General "may, after notice and opportunity for hearing, revoke any license issued under this section **[*4]** if the holder of such license has willfully violated any provision of this chapter or any rule or regulation prescribed by the Attorney General under this chapter . . ." *18 U.S.C. § 923(e)*.

ATF inspectors found violations of one or both of the provisions detailed above after inspections of The General Store in 2000, 2001, and 2003. Following the January 2003 inspection, as detailed in the Ninth Circuit's opinion:

> Richard Van Loan ("Van Loan"), Director of Industry Operations for the Seattle Field Division of the ATF, issued a Notice of Revocation of The General Store's federal firearms license on August 6, 2004. The General Store received an administrative hearing in early 2005. Van Loan issued the Final Notice of Revocation of Firearms License, with his findings and conclusions, on February 16, 2006. Van Loan based the final revocation on the following five violations:
>
> (1) Willful violation of *27 C.F.R. § 478.125* for failure to adequately maintain an Acquisition and Disposition Record for firearms acquired for repair.
>
> (2) Willful violation of *18 U.S.C. § 923(g)(1)* and *27 C.F.R. § 478.125* for failure to fully record the "source" of acquired firearms.
>
> (3) Willful violation of *18 U.S.C. § 923(g)(1)* **[*5]** and *27 C.F.R. § 478.125* for failure to log eighty missing or stolen firearms in its Acquisition and Disposition Record.
>
> (4) Willful violation of *18 U.S.C. § 923(g)(1)* and *27 C.F.R. § 478.125* for failure to log seventeen firearms that were lost or stolen, then ultimately recovered and resold.
>
> (5) Willful violation of *18 U.S.C. § 922(b)(2)* for failure to comply with state law, specifically *Revised Code of Washington § 9.41.090*, which requires the dealer to send a copy of all handgun applications to the chief of police or sheriff of the purchaser's place of residence.
>
> The General Store filed a timely petition for "de novo judicial review" in district court as provided by *18 U.S.C. § 923(f)(3)*. The General Store requested that Van Loan stay the revocation pending judicial review pursuant to *18 U.S.C. § 923(f)(2)* and *27 C.F.R. § 478.78*; Van Loan denied the request. On cross-motions for summary judgment, the district court upheld the first and fifth violations, and the revocation of The General Store's license.

General Store, 560 F.3d at 922-23. *Inspections During the Litigation Period*

While The General Store's challenge to the revocation was pending in district court, The General Store was allowed **[*6]** to continue selling firearms from its inventory. (AR 410) (citing *The General Store, Inc. v. Van Loan, 2006 U.S. Dist. LEXIS 31997, 2006 WL 1455645 (E.D. WA, May 19, 2006)* (order granting preliminary injunction in part)). However, the Court explicitly required The General Store "to comply with all applicable laws, ordinances, and regulations" while the litigation was pending. *Id.* Pursuant to the court order, the ATF conducted additional inspections of The General Store's firearms department during that time (AR 410-11). ATF uncovered four separate types of alleged violations of the Gun Control Act and related regulations during those inspections.

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[1] The District Court for the Eastern District of Washington (Judge Van Sickle) upheld the revocation in 2007, *The General Store, Inc. v. Van Loan, No. 06-103, 2007 U.S. Dist. LEXIS 5078, 2007 WL 208425 (E.D. Wa. Jan. 24, 2007)* **[*3]** (unpublished disposition). The Ninth Circuit affirmed the District Court in 2009, *The General Store, Inc. v. Van Loan, 551 F.3d 1093, 1098 (9th Cir. 2008)*, amended and superseded by *560 F.3d 920 (9th Cir. 2009)*.

First, in a June 4, 2006, inspection, an inspector found that The General Store had transferred two rifles and one shotgun to a California resident (AR 411). The ATF determined that this sale constituted a violation of *18 U.S.C. § 922(b)(3)*[2] because California law requires a 10-day waiting period and does not provide for a sale of firearms to California residents in other states (AR 411).

Second, in a July 19, 2006, inspection, the agency found two open dispositions in the Acquisitions and Dispositions record for which there were not corresponding firearms in the store's physical inventory (AR 411). As the administrative hearing officer found:

> The firearms included a Winchester, model 1300, 12 gauge shotgun, and a Taurus, model 24/7, .45 caliber pistol. See [Gov. Ex. 27]. On July 20, 2006, ATF received a fax from store employee, Nick Fjellstrom, which included an ATF form 4473 showing that the Taurus .45 caliber pistol had been sold on February 17, 2006. (Gov. Exs. 27, 29). As to the Winchester 12 gauge shotgun, an employee of The General Store informed ATF that the firearm was transferred, but that a different firearm had mistakenly been logged out of the [Acquisitions and Dispositions] record. (Gov. Exs. 27, 28). The General Store subsequently provided ATF with a copy of the ATF Form 4473 showing the transfer of the shotgun.

(AR 411) (Finding 8b of the hearing examiner's findings and conclusions).

Third, the July 19, inspection also revealed an over-the-counter transaction carried out by Mr. Barany himself in which The General Store transferred a firearm **[*8]** to a purchaser who indicated on ATF Form 4473 that he was a Washington State resident but listed only a Hawaii residence address on the form and provided a Hawaii driver's license as identification (AR 118-19). ATF found this action to violate *18 U.S.C. 923(g)(1)(A)*, *27 CFR 478.125*, and *27 CFR 478.124(c)(1)* because although the purchaser claims that he told Mr. Barany that he is a part-time resident of Washington, Mr. Barany did not advise him to disclose a Washington residence on ATF Form 4473 (AR 119).

Fourth, when ATF investigators arrived at The General Store to conduct an inspection on November 21, 2006, and asked to see the Acquisitions and Dispositions records, employee Mr. Fjellstrom informed them that the book of records was locked in a cabinet to which he did not have a key (AR 131). ATF found that these circumstances constituted a failure to make records available for examination, as required of licensees by *18 U.S.C. § 923(g)* and *27 CFR § 478.121(b)* (AR 412).

License Denial

According to the Administrative Record filed with the Court, after the revocation of The General Store's federal firearms dealers license, Mr. Barany submitted an application to the ATF for a new license **[*9]** on approximately June 10 or 12, 2008 (AR 135, 414). Mr. Barany listed his own name as the "Name of Owner or Corporation" and listed "General Store" as the "Trade or Business Name, *if any*" on the application form (AR 132). Mr. Barany provided the address of The General Store in the section of the form requesting "Business Address" (AR 132). The application form also asked whether the "Applicant or any Person [previously identified as an Individual Owner, Partner, and Other Responsible Person[] in the Business]" had previously "Held a Federal Firearms License," "Been an Officer in a Corporation Holding a Federal Firearms License," "Been an Employee of a Federal Firearms Licensee," or "Had a Federal Firearms License Revoked" (AR 134). Mr. Barany marked "Yes" as his response for all of those questions (AR 134). Mr. Barany paid for the licensing fee by a check written from an account in the name of "The General Store LLC," an entity of which the State of Washington has no record (AR 165).

ATF denied Mr. Barany's application in an initial Notice of Denial on November 21, 2008, on the basis that Mr. Barany was responsible for the willful violations that supported revocation of The General **[*10]** Store's license (AR 2-7). Following an administrative hearing, ATF issued on June 30, 2008, a Final Notice of Denial of Mr. Barany's application along with findings of fact and conclusions of law from the administrative hearing (AR 407-18).

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

[2] ***18 U.S.C. § 922(b)(3)*** requires a sale of a firearm to a resident of a state other than the state in which the licensee's place of business is located to comply with both states' legal **[*7]** conditions of sale.

that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A key purpose of summary judgment "is to isolate and dispose of factually unsupported claims . . . ." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Summary judgment is "not a disfavored procedural shortcut," but is instead the "principal tool[ ] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." Celotex, 477 U.S. at 327.

Summary judgment is inappropriate where sufficient evidence supports the claimed factual dispute or where different ultimate inferences may reasonably be drawn from **[*11]** the undisputed facts. Miller v. Glenn Miller Productions, Inc., 454 F.3d 975, 988 (9th Cir. 2006).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See* Celotex, 477 U.S. at 323. The moving party must demonstrate to the Court that there is an absence of evidence to support the non-moving party's case. *See* Celotex Corp., 477 U.S. at 325. The burden then shifts to the non-moving party to "set out 'specific facts showing a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). The evidence supporting summary judgment must be admissible. Fed. R. Civ. P. 56(e). Furthermore, the court will not presume missing facts, and non-specific facts in affidavits are not sufficient to support or undermine a claim. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888-89, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990).

ANALYSIS

Mr. Barany challenges the ATF's denial of his license application pursuant to *18 U.S.C. § 923(f)*. The district court exercises *de novo* review. *18 U.S.C. §923(f)(3)*. The district court is not required to give deference to the agency's findings or conclusions, but may accord them as much weight as the court believes they deserve in light **[*12]** of the administrative record and the additional evidence submitted. *See Cucchiara v. Secretary of Treasury, 652 F.2d 28, 30, note 1 (9th Cir. 1981)*; Stein's Inc. v. Blumenthal, 649 F.2d 463, 466-67 (7th Cir. 1980).

The pertinent question before this Court is whether the ATF, to whom the Attorney General delegated its authority to revoke or deny firearms licenses, was "authorized" to deny Mr. Barany's application. *18 U.S.C. § 923(f)(3)* (stating scope of judicial review); 28 C.F.R. § 0.130(a)(1) (Attorney General's delegation of authority to the ATF); *see also* Morgan v. U.S. Dept. of Justice, ATF, 473 F. Supp. 2d 756, 762 (E.D. Mich.2007) (noting that *§923(f)* confines the district court's inquiry to the narrow question of whether the Attorney General's decision was "authorized").

The parties raised no disputed issues of material fact and neither party submitted additional evidence to the district court. Rather, they dispute whether, as a matter of law, the agency was authorized to deny Mr. Barany's application on the basis of the willful violations that supported revoking The General Store's firearms license more than five years after those willful violations took place.

Attribution of Previous [*13] Willful Violations by The General Store to Mr. Barany

At the heart of Mr. Barany's appeal is his assertion that the ATF was not authorized to base its denial of his federal firearms license application on the willful violations that supported revocation of The General Store's federal firearms license because the company is a separate entity from Mr. Barany. The United States responds that the ATF was authorized under *18 U.S.C. § 923(d)(1)(C)* of the Gun Control Act to deny Mr. Barany's license based both on Mr. Barany's own misconduct and the willful noncompliance of The General Store, Mr. Barany's former firearms business, that is attributable to Mr. Barany personally.

The Gun Control Act authorizes the Attorney General to deny an application if the applicant has "willfully violated" any provision of the Gun Control Act. *18 U.S.C. § 923(d)(1)(C)*. Specifically, the Act provides in *18 U.S.C. § 923(d)(1)*:

> Any application submitted under subsection (a) or (b) of this section shall be approved if—
>
> (A) the applicant is twenty-one years of age or over;
>
> (B) the applicant (including, in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the **[*14]** power to direct or cause the direction of the management and policies of the corporation, partnership, or association) is not prohibited from transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce under *section 922(g)* and *(n)* of this chapter;

> (C) the applicant has not willfully violated any of the provisions of this chapter or regulations issued thereunder;
>
> (D) the applicant has not willfully failed to disclose any material information required, or has not made any false statement as to any material fact, in connection with his application;
>
> . . .

Willfulness is established "when a dealer understands the requirements of the law, but knowingly fails to follow them or was indifferent to them." *Perri v. Department of Treasury; Bureau of Alcohol, Tobacco and Firearms, 637 F.2d 1332, 1336 (9th Cir. 1981)*. In the Ninth Circuit's opinion on The General Store's appeal, the court explained that "indifference" means "plain indifference," which is indistinguishable from recklessness. *The General Store, 560 F.3d at 923*. "Mere mistake or negligence" is insufficient to establish a willful violation. *The General Store, 560 F.3d at 923*. This interpretation of the **[*15]** term "willfully" in the statute is in line with the interpretation of other circuits. *See, e.g., Prino v. Simon, 606 F.2d 449, 450 (4th Cir.1979)* ("'Willful' means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality").

Since there is rarely direct evidence of willfulness, the government often shows willfulness by showing that a licensee repeatedly violated regulations despite knowledge of them and repeated warnings. However, a showing of repeated violations is not required if the government otherwise can show willfulness. *See American Arms Intern. v. Herbert, 563 F.3d 78, 87 (4th Cir. 2009)* ("Plain indifference can be found even where nine times out of ten a licensee acts in accordance with the regulations, if he was plainly indifferent to the one-in-ten violation").

Despite the sophisticated and creative arguments forwarded by Mr. Barany's counsel as to why, legally, Mr. Barany and The General Store should be considered separate entities, this Court need look no further than Mr. Barany's own representations on his firearms license application in 2008 to determine that The General Store's willful violations of the Gun Control Act **[*16]** should be attributed to Mr. Barany personally, under the plain language of the Gun Control Act (AR 134).

In his application, Mr. Barany represented that he, the applicant, had: (1) previously held a federal firearms license; (2) been an officer in a corporation holding a federal firearms license; and (3) had a federal firearms license revoked (AR 134). To be eligible for a federal firearms license under the Gun Control Act, *18 U.S.C. § 923(d)(1)*, "the applicant" must not have "willfully violated any of the provisions of this chapter or regulations issued thereunder." By his own statement in the application, Mr. Barany directly associated himself with the previous license-holder, whose license was revoked for willfully violating provisions of the Gun Control Act and related regulations. Therefore, under *18 U.S.C. § 923(d)(1)*, Mr. Barany was ineligible for approval for a new federal firearms license and the ATF was authorized in denying his application.

Furthermore, ample information in the administrative record before the Court supports that Mr. Barany's new firearms business would have been tightly unified with The General Store and substantially indistinguishable from the firearms business **[*17]** for which the license had been revoked effective 2006. At the time of his application in 2008, Mr. Barany was the corporate officer and responsible person directly involved with the day-to-day operations of The General Store's retail firearms business (AR 3, 160). Mr. Barany represented during his firearms application inspection interview that he would operate his new business on The General Store's premises, purchase firearms from the same suppliers that The General Store used under the previous license, advertise his new firearms business within The General Store's monthly circular ad, and share employees with The General Store, including employees who were associated with firearms sales under the previously revoked license (AR 160-65). In addition, Mr. Barany paid his federal firearms license application fee with a check written from the account of "The General Store, LLC" rather than from a personal bank account (AR 167).[3]

The many continuities from The General Store to Mr. Barany's proposed successor firearms retail business, also identified as "General Store" on his application, **[*18]** support the conclusion that The General Store's actions, including willful violations of the Gun Control Act, are attributable to Mr. Barany. Therefore, ATF was authorized in denying Mr. Barany's application. *Casanova Guns, Inc. v. Connally, 454 F.2d 1320, 1321-23* (affirming denial of a federal firearms license renewal application because the business operations of the

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[3] The ATF determined that the State of Washington has no record of an entity known as "The General Store, LLC."

applicant were "substantially same as the operations of its related predecessor" and were run by the same responsible persons as the related predecessor, which was ineligible for renewal of its own federal firearms license).

Applicability of Statute of Limitations

Plaintiff contends that the ATF could not have properly relied on pre-2003 willful violations of the Gun Control Act in denying Mr. Barany's application because of a five year statute of limitations contained in 28 U.S.C. § 2462 (Time for commencing proceedings).

That statute provides in full:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, **[*19]** within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462.

However, Mr. Barany provides no authority that persuades the Court that the limitations statute applies in this matter. The plain language of the statute states that it applies only to actions, suits, or proceedings "for the enforcement of any civil fine, penalty, or forfeiture" and only to actions instituted by the United States. 28 U.S.C. § 2462; *see also* Erie Basin Metal Products, Inc. v. U.S., 138 Ct. Cl. 67, 150 F. Supp. 561, 566 (1957) ("The limitation of section 2462 applies only to actions instituted by the Government). The United States did not commence proceedings in this matter. Mr. Barany commenced the proceedings by applying for a license, requesting a hearing to review the ATF's notice of denial of the application, pursuant to *18 U.S.C. §923(f)(2)*, and seeking judicial review of the agency's decision, pursuant to *18 U.S.C. §923(f)(3)*.

Case law supports that the term "enforcement" includes "assessment" of fines and penalties, Federal Election Com'n v. Williams, 104 F.3d 237, 240 (9th Cir. 1996), but there is no indication **[*20]** that it is so broad as to encompass the Attorney General's denial of a license to sell firearms. Rather, revocation of a license is generally a remedial measure rather than a penalty because it is intended to achieve safety-related civil and remedial goals. Rivera v. Pugh, 194 F.3d 1064, 1068 (9th Cir. 1999) (addressing whether a statute regarding driver's license revocation was a civil remedy rather than a criminal penalty for purposes of double jeopardy). There is no logical basis for characterizing the denial of a license application as punitive rather than remedial.

The case relied on by Mr. Barany for his assertion that 28 U.S.C. § 2462 applies to federal firearms actions, Article II Gun Shop, Inc. v. Gonzales, 441 F.3d 492 (7th Cir. 2006), does not reach the question of whether that statute of limitations applies to denials of federal firearms licenses. Rather, the *Article II Gun Shop* decision, which concerned a revocation, avoids analyzing or deciding the issue on the basis of the applicability of the statute of limitations and instead determines that consideration of ATF inspections reports from 21 and 5 years before the revocation was permissible "as evidence that [the licensee] **[*21]** knew of its obligations to correctly complete Forms 4473 for the guns it sold" and not as the source of the violations supporting revocation. 441 F.3d at 496. Notably, the government in the *Article II Gun Shop* case did not dispute the applicability of the statute of limitations. 441 F.3d at 496.

Moreover, as in *Article II Gun Shop*, the ATF was authorized to deny Mr. Barany's application based on post-2003 violations of the Gun Control Act, including his own recordkeeping violation and other violations as outlined in the factual background above. These post-2003 violations may properly be characterized as "willful" in light of the context in which they occurred, namely that the sales were allowed only pursuant to a court order directing The General Store to comply with all applicable laws, ordinances and allowing ATF to conduct inspections every two weeks (AR 109-12).

The Court finds that 28 U.S.C. § 2462 does not bar the ATF's denial of Mr. Barany's application.

Conclusion

Although the Court acknowledges the hardship on Mr. Barany's business imposed by the denial of a federal license to sell firearms, the Court finds that the ATF was authorized under the relevant provisions of the Gun **[*22]** Control Act, *18 U.S.C. § 923*, to deny Mr. Barany's federal firearms license application.

Therefore, **IT IS SO ORDERED:**

1. The Plaintiff's Motion for Summary Judgment (**Ct. Rec. 16**) is **DENIED**;

2. The Defendant's Motion for Summary judgment (**Ct. Rec. 29**) is **GRANTED**;

3. All pending motions, if any, are **DENIED AS MOOT**.

4. All pending deadlines and hearing dates, if any, are hereby **STRICKEN**.

The District Court Executive is directed to enter this Order, enter judgment against Plaintiff and in favor of Defendant, forward copies to counsel, and close the file.

DATED this 6th day of December, 2010.

/s/ Rosanna Malouf Peterson

ROSANNA MALOUF PETERSON

United States District Court Judge

End of Document

Calendar No. 363

108TH CONGRESS
1ST SESSION

S. 1805

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.

IN THE SENATE OF THE UNITED STATES

OCTOBER 31, 2003

Mr. CRAIG introduced the following bill; which was read the first time

NOVEMBER 3, 2003

Read the second time and placed on the calendar

A BILL

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Protection of Lawful Commerce in Arms Act".

SEC. 2. FINDINGS; PURPOSES.

(a) FINDINGS.—The Congress finds the following:

(1) Citizens have a right, protected by the Second Amendment to the United States Constitution, to keep and bear arms.

(2) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(3) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(4) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition that has been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or

ammunition products that function as designed and intended.

(5) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(6) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would con-

stitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(b) PURPOSES.—The purposes of this Act are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products for the harm caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers,

distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL LIABILITY ACTIONS IN FEDERAL OR STATE COURT.

(a) IN GENERAL.—A qualified civil liability action may not be brought in any Federal or State court.

(b) DISMISSAL OF PENDING ACTIONS.—A qualified civil liability action that is pending on the date of enactment of this Act shall be immediately dismissed by the court in which the action was brought.

SEC. 4. DEFINITIONS.

In this Act, the following definitions shall apply:

(1) ENGAGED IN THE BUSINESS.—The term "engaged in the business" has the meaning given that term in section 921(a)(21) of title 18, United States Code, and, as applied to a seller of ammunition, means a person who devotes, time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) MANUFACTURER.—The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.

(3) PERSON.—The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) QUALIFIED PRODUCT.—The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) QUALIFIED CIVIL LIABILITY ACTION.—

(A) IN GENERAL.—The term "qualified civil liability action" means a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade asso-

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ciation, for damages resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

(i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law;

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(II) any case in which the manufacturer or seller aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(III) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18, United States Code;

(iv) an action for breach of contract or warranty in connection with the purchase of the product; or

(v) an action for physical injuries or property damage resulting directly from a defect in design or manufacture of the

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product, when used as intended or in a manner that is reasonably foreseeable.

(B) NEGLIGENT ENTRUSTMENT.—As used in subparagraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) REASONABLY FORESEEABLE.—As used in subparagraph (A)(v), the term "reasonably foreseeable" does not include any criminal or unlawful misuse of a qualified product, other than possessory offenses.

(D) RULE OF CONSTRUCTION.—The exceptions described in subparagraph (A) shall be construed so as not to be in conflict and no provision of this Act shall be construed to create a Federal private cause of action or remedy.

(6) SELLER.—The term "seller" means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who

is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code;

(B) a dealer (as defined in section 921(a)(11) of title 18, United States Code) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level, who is in compliance with all applicable Federal, State, and local laws.

(7) STATE.—The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United

States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION.—The term "trade association" means any association or business organization (whether or not incorporated under Federal or State law)—

(A) that is not operated for profit;

(B) of which 2 or more members are manufacturers or sellers of a qualified product; and

(C) that is involved in promoting the business interests of its members, including organizing, advising, or representing its members with respect to their business, legislative or legal activities in relation to the manufacture, importation, or sale of a qualified product.

(9) UNLAWFUL MISUSE.—The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

Calendar No. 363

108TH CONGRESS
1ST SESSION

S. 1805

A BILL

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.

NOVEMBER 3, 2003

Read the second time and placed on the calendar

MR 370

Public Law 109–92
109th Congress

An Act

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others.

Oct. 26, 2005
[S. 397]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

Protection of Lawful Commerce in Arms Act.
15 USC 7901 note.

This Act may be cited as the "Protection of Lawful Commerce in Arms Act".

SEC. 2. FINDINGS; PURPOSES.

15 USC 7901.

(a) FINDINGS.—Congress finds the following:

(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

(3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing

in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

(b) PURPOSES.—The purposes of this Act are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

(7) To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

15 USC 7902.

SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL LIABILITY ACTIONS IN FEDERAL OR STATE COURT.

(a) IN GENERAL.—A qualified civil liability action may not be brought in any Federal or State court.

(b) DISMISSAL OF PENDING ACTIONS.—A qualified civil liability action that is pending on the date of enactment of this Act shall be immediately dismissed by the court in which the action was brought or is currently pending.

SEC. 4. DEFINITIONS. 15 USC 7903.

In this Act:

(1) ENGAGED IN THE BUSINESS.—The term "engaged in the business" has the meaning given that term in section 921(a)(21) of title 18, United States Code, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) MANUFACTURER.—The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.

(3) PERSON.—The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) QUALIFIED PRODUCT.—The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) QUALIFIED CIVIL LIABILITY ACTION.—

(A) IN GENERAL.—The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

(i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required

to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18, United States Code;

(iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of title 18 or chapter 53 of title 26, United States Code.

(B) NEGLIGENT ENTRUSTMENT.—As used in subparagraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) RULE OF CONSTRUCTION.—The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this Act shall be construed to create a public or private cause of action or remedy.

(D) MINOR CHILD EXCEPTION.—Nothing in this Act shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) SELLER.—The term "seller" means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code;

(B) a dealer (as defined in section 921(a)(11) of title 18, United States Code) who is engaged in the business as such a dealer in interstate or foreign commerce and

who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level.

(7) STATE.—The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION.—The term "trade association" means—

(A) any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) UNLAWFUL MISUSE.—The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

SEC. 5. CHILD SAFETY LOCKS.

Child Safety Lock Act of 2005. 18 USC 921 note.

(a) SHORT TITLE.—This section may be cited as the "Child Safety Lock Act of 2005".

18 USC 922 note.

(b) PURPOSES.—The purposes of this section are—

(1) to promote the safe storage and use of handguns by consumers;

(2) to prevent unauthorized persons from gaining access to or use of a handgun, including children who may not be in possession of a handgun; and

(3) to avoid hindering industry from supplying firearms to law abiding citizens for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(c) FIREARMS SAFETY.—

(1) MANDATORY TRANSFER OF SECURE GUN STORAGE OR SAFETY DEVICE.—Section 922 of title 18, United States Code, is amended by inserting at the end the following:

"(z) SECURE GUN STORAGE OR SAFETY DEVICE.—

"(1) IN GENERAL.—Except as provided under paragraph (2), it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer any handgun to any person other than any person licensed under this chapter, unless the transferee is provided with a secure gun storage or safety device (as defined in section 921(a)(34)) for that handgun.

"(2) EXCEPTIONS.—Paragraph (1) shall not apply to—

"(A)(i) the manufacture for, transfer to, or possession by, the United States, a department or agency of the United

States, a State, or a department, agency, or political subdivision of a State, of a handgun; or

"(ii) the transfer to, or possession by, a law enforcement officer employed by an entity referred to in clause (i) of a handgun for law enforcement purposes (whether on or off duty); or

"(B) the transfer to, or possession by, a rail police officer employed by a rail carrier and certified or commissioned as a police officer under the laws of a State of a handgun for purposes of law enforcement (whether on or off duty);

"(C) the transfer to any person of a handgun listed as a curio or relic by the Secretary pursuant to section 921(a)(13); or

"(D) the transfer to any person of a handgun for which a secure gun storage or safety device is temporarily unavailable for the reasons described in the exceptions stated in section 923(e), if the licensed manufacturer, licensed importer, or licensed dealer delivers to the transferee within 10 calendar days from the date of the delivery of the handgun to the transferee a secure gun storage or safety device for the handgun.

"(3) LIABILITY FOR USE.—

"(A) IN GENERAL.—Notwithstanding any other provision of law, a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, shall be entitled to immunity from a qualified civil liability action.

"(B) PROSPECTIVE ACTIONS.—A qualified civil liability action may not be brought in any Federal or State court.

"(C) DEFINED TERM.—As used in this paragraph, the term 'qualified civil liability action'—

"(i) means a civil action brought by any person against a person described in subparagraph (A) for damages resulting from the criminal or unlawful misuse of the handgun by a third party, if—

"(I) the handgun was accessed by another person who did not have the permission or authorization of the person having lawful possession and control of the handgun to have access to it; and

"(II) at the time access was gained by the person not so authorized, the handgun had been made inoperable by use of a secure gun storage or safety device; and

"(ii) shall not include an action brought against the person having lawful possession and control of the handgun for negligent entrustment or negligence per se.".

(2) CIVIL PENALTIES.—Section 924 of title 18, United States Code, is amended—

(A) in subsection (a)(1), by striking "or (f)" and inserting "(f), or (p)"; and

(B) by adding at the end the following:

"(p) PENALTIES RELATING TO SECURE GUN STORAGE OR SAFETY DEVICE.—

"(1) IN GENERAL.—

"(A) SUSPENSION OR REVOCATION OF LICENSE; CIVIL PENALTIES.—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—

"(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

"(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

"(B) REVIEW.—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

"(2) ADMINISTRATIVE REMEDIES.—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.".

(3) LIABILITY; EVIDENCE.— 18 USC 922 note.

(A) LIABILITY.—Nothing in this section shall be construed to—

(i) create a cause of action against any Federal firearms licensee or any other person for any civil liability; or

(ii) establish any standard of care.

(B) EVIDENCE.—Notwithstanding any other provision of law, evidence regarding compliance or noncompliance with the amendments made by this section shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity, except with respect to an action relating to section 922(z) of title 18, United States Code, as added by this subsection.

(C) RULE OF CONSTRUCTION.—Nothing in this paragraph shall be construed to bar a governmental action to impose a penalty under section 924(p) of title 18, United States Code, for a failure to comply with section 922(z) of that title.

(d) EFFECTIVE DATE.—This section and the amendments made by this section shall take effect 180 days after the date of enactment of this Act. 18 USC 922 note.

SEC. 6. ARMOR PIERCING AMMUNITION.

(a) UNLAWFUL ACTS.—Section 922(a) of title 18, United States Code, is amended by striking paragraphs (7) and (8) and inserting the following:

"(7) for any person to manufacture or import armor piercing ammunition, unless—

"(A) the manufacture of such ammunition is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

"(B) the manufacture of such ammunition is for the purpose of exportation; or

"(C) the manufacture or importation of such ammunition is for the purpose of testing or experimentation and has been authorized by the Attorney General;

"(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, unless such sale or delivery—

"(A) is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

"(B) is for the purpose of exportation; or

"(C) is for the purpose of testing or experimentation and has been authorized by the Attorney General;".

(b) PENALTIES.—Section 924(c) of title 18, United States Code, is amended by adding at the end the following:

"(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

"(A) be sentenced to a term of imprisonment of not less than 15 years; and

"(B) if death results from the use of such ammunition—

"(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

"(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.".

(c) STUDY AND REPORT.—

(1) STUDY.—The Attorney General shall conduct a study to determine whether a uniform standard for the testing of projectiles against Body Armor is feasible.

(2) ISSUES TO BE STUDIED.—The study conducted under paragraph (1) shall include—

(A) variations in performance that are related to the length of the barrel of the handgun or center-fire rifle from which the projectile is fired; and

(B) the amount of powder used to propel the projectile.

(3) REPORT.—Not later than 2 years after the date of enactment of this Act, the Attorney General shall submit a report containing the results of the study conducted under this subsection to—

(A) the chairman and ranking member of the Committee on the Judiciary of the Senate; and

(B) the chairman and ranking member of the Committee on the Judiciary of the House of Representatives.

Approved October 26, 2005.

LEGISLATIVE HISTORY—S. 397:

CONGRESSIONAL RECORD, Vol. 151 (2005):
July 27–29, considered and passed Senate.
Oct. 20, considered and passed House.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 41 (2005):
Oct. 26, Presidential statement.

doing heart transplants, using the best of lasers to resect tumors out of the trachea or windpipe, and with developing ventricular assist devices. I was in Tanzania some weeks ago working at a small clinic out in the bush, and when you look back at America, we have the most advanced health care in the world, with new treatments and techniques, improving millions of lives every day.

Through this bill, we are putting that same sort of American ingenuity to work in improving patient safety in hospitals and clinics and thus getting rid of waste and improving the overall quality of care. This bill is a major step forward to making health care safer and less costly, driving up the quality, driving down costs, and getting out the waste.

I can tell you, this is the first major health bill in this Congress. But I hope in the very near future we will pass other important legislation we are working on in a similarly bipartisan way—namely, information technology to have privacy-protected, electronic medical records available to everybody who wants it. It is a bipartisan effort. We have come a long way, and I am hopeful that we can do that in the near future.

We are establishing interoperability standards—working with the private sector to establish interoperability standards which will allow the 6,000 hospitals and 900,000 physicians out there to be able to communicate in a seamless way, with privacy-protected information. Again, it is another bill that would get rid of waste, drive down the cost of health care, and improve quality.

I am excited about these health initiatives. I thank my colleagues who have specifically been involved in this bill, including Chairman MIKE ENZI, Senator JUDD GREGG, Senator JIM JEFFORDS, who has been at it as long as anybody—this particular bill on patient safety—and, of course, Senator TED KENNEDY. On the House side, Chairman JOE BARTON and ranking member JOHN DINGELL have done a tremendous job as well shepherding through, the Patient Safety and Quality Improvement Act. We are saving lives and moving American medicine forward.

Mr. President, I suggest the absence of a quorum.

The PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. CRAIG. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. CRAIG. Mr. President, I understand that the Republican side has from 10 until 11, is that correct, under the unanimous consent agreement?

The PRESIDENT pro tempore. That is correct. The first hour is under the control of the majority, the second hour is under the control of the minority, and it reverts back to the majority and then the minority.

Mr. CRAIG. Mr. President, I send to the desk a list of 61 cosponsors of S. 397, the Protection of Lawful Commerce in Arms Act that is currently pending before the Senate, and I ask unanimous consent that it be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

COSPONSORS, BY DATE

Sen. Baucus, Max [D-MT]—2/16/2005*, Sen. Bunning, Jim [R-KY]—2/16/2005*, Sen. Chambliss, Saxby [R-GA]—2/16/2005*, Sen. Collins, Susan M. [R-ME]—2/16/2005*, Sen. Craig, Larry [R-ID], Sen. Crapo, Mike [R-ID]—2/16/2005*, Sen. Ensign, John [R-NV]—2/16/2005*, Sen. Hutchison, Kay Bailey [R-TX]—2/16/2005*, Sen. Isakson, Johnny [R-GA]—2/16/2005*, Sen. Kyl, Jon [R-AZ]—2/16/2005*. Sen. Murkowski, Lisa [R-AK]—2/16/2005*, Sen. Santorum, Rick [R-PA]—2/16/2005*, Sen. Snowe, Olympia J. [R-ME]—2/16/2005*, Sen. Thomas, Craig [R-WY]—2/16/2005*, Sen. Sununu, John E. [R-NH]—2/16/2005*, Sen. Vitter, David [R-LA]—2/17/2005, Sen. DeMint, Jim [R-SC]—3/1/2005.

Sen. Dorgan, Byron L. [D-ND]—3/1/2005, Sen. Gregg, Judd [R-NH]—3/1/2005, Sen. Hatch, Orrin G. [R-UT]—3/1/2005, Sen. Frist, William H. [R-TN]—3/3/2005, Sen. Graham, Lindsey [R-SC]—3/4/2005, Sen. Cochran, Thad [R-MS]—3/9/2005, Sen. Shelby, Richard C. [R-AL]—3/9/2005, Sen. Burr, Richard [R-NC]—3/10/2005, Sen. Specter, Arlen [R-PA]—3/14/2005, Sen. Pryor, Mark L. [D-AR]—3/16/2005, Sen. Roberts, Pat [R-KS]—3/17/2005, Sen. Bennett, Robert F. [R-UT]—4/12/2005, Sen. McCain, John [R-AZ]—7/21/2005, Sen. Byrd, Robert C. [D-WV]—7/25/2005, Sen. Alexander, Lamar [R-TN]1—2/16/2005*, Sen. Burns, Conrad R. [R-MT]—2/16/2005*. Sen. Coburn, Tom [R-OK]—2/16/2005*.

Sen. Cornyn, John [R-TX]—2/16/2005*, Sen. Domenici, Pete V. [R-NM]—2/16/2005*, Sen. Enzi, Michael B. [R-WY]—2/16/2005*, Sen. Inhofe, James M. [R-OK]—2/16/2005*, Sen. Johnson, Tim [D-SD]—2/16/2005*, Sen. Lincoln, Blanche L. [D-AR]—2/16/2005*, Sen. Nelson, E. Benjamin [D-NE]—2/16/2005*, Sen. Sessions, Jeff [R-AL]—2/16/2005*, Sen. Stevens, Ted [R-AK]—2/16/2005*, Sen. Thune, John [R-SD]—2/16/2005*, Sen. Allen, George [R-VA]—2/17/2005, Sen. Landrieu, Mary L. [D-LA]—2/17/2005, Sen. Dole, Elizabeth [R-NC]—3/1/2005, Sen. Grassley, Chuck [R-IA]—3/1/2005, Sen. Hagel, Chuck [R-NE]—3/1/2005.

Sen. Lott, Trent [R-MS]—3/2/2005, Sen. Talent, Jim [R-MO]—3/3/2005, Sen. Allard, Wayne [R-CO]—3/7/2005, Sen. Martinez, Mel [R-FL]—3/9/2005, Sen. Brownback, Sam [R-KS]—3/10/2005. Sen. Bond, Christopher S. [R-MO]—3/14/2005, Sen. McConnell, Mitch [R-KY]—3/15/2005. Sen. Coleman, Norm [R-MN]—3/16/2005, Sen. Voinovich, George V. [R-OH]—4/12/2005, Sen. Smith, Gordon H. [R-OR]—4/27/2005, Sen. Salazar, Ken [D-CO]—7/21/2005, Sen. Rockefeller, John D. [D-WV]—7/26/2005.

Mr. CRAIG. Mr. President, the reason I sent that list of cosponsors to the desk is to demonstrate to all of our colleagues that 61 Senators—60 plus myself—are now in support of the legislation that is pending before the Senate that we will move to active consideration of this afternoon at 2 o'clock. I think it demonstrates to all of us the broad, bipartisan support this legislation has and a clear recognition that the time for S. 397 has arrived.

This legislation prohibits one narrow category of lawsuits: suits against the firearms industry for damages resulting from the criminal or unlawful misuse of a firearm or ammunition by a third party.

It is very important for everybody to understand that it is that and nothing more. These predatory lawsuits are aimed at bankrupting the firearms industry. The courts of our Nation are supposed to be a forum for resolving controversies between citizens and providing relief where it is warranted, not a mechanism for achieving political ends that are rejected by the people's representatives, the Congress of the United States.

Time and time again down through history, that rejection has occurred on this floor and the floor of the other body.

Interest groups, knowing that clear well, have now chosen the court route to attempt to destroy this very valuable industry in our country.

Over two dozen suits have been filed on a variety of theories, but all seek the same goal of forcing law-abiding businesses selling a legal product to pay for damages from the criminal misuse of that product. I must say, if the trial bar wins here, the next step could be another industry and another product.

While half of these lawsuits have already been fully and finally dismissed, other cases are still on appeal and pending. Hundreds of millions of dollars are still being spent. The bill would require the dismissal of existing suits, as well as future suits that fit this very narrow category of description. It is not a gun industry immunity bill because it does not protect firearms or ammunition manufacturers, sellers, or trade associations from any other lawsuits based on their own negligence or criminal conduct.

This bill gives specific examples of lawsuits not prohibited—product liability, negligence or negligent entrustment, breach of contract, lawsuits based on violations of States and Federal law. And yet, we already heard the arguments on the floor yesterday, and I am quite confident we will hear them again and tomorrow, that this is a sweeping approach toward creating immunity for the firearms industry.

I repeat for those who question it, read the bill and read it thoroughly. It is not a long bill. It is very clear and very specific.

The trend of abusive litigation targeting the firearms industry not only defies common sense and concepts of fundamental fairness, but it would do nothing to curb criminal gun violence. Furthermore, it threatens a domestic industry that is critical to our national defense, jeopardizes hundreds of thousands of good-paying jobs, and puts at risk access Americans have to a legal product used for hundreds of years across this Nation for lawful purposes, such as recreation and self-defense.

Thirty-three States enacted similar gun lawsuit bans or civil liability protection. In other words, already 33

important to recognize because it does put in context something that can very easily be taken out of context.

Michael Golden, president and CEO of Smith & Wesson, put it this way. He speaks to a letter in response to the Brady Center's wire story, obviously trying to knock down the claims of gun manufacturers in their support of the Protection of Lawful Commerce in Arms Act. He stated:

In the article, the Brady Center attempts to miuimize the financial implications that the numerous "junk" lawsuits have had on the firearms industries. To support their position, they cite, among other things, Smith & Wesson's most recent 10-Q, filed with the Securities and Exchange Commission. They quote Smith & Wesson's filing, stating, "In the nine months ended January 31, 2005, we incurred $4,535 in defense costs, net of amounts received from insurance carriers, relative to product liability and municipal litigation."

As stated in our filing, the figure report reflects fees incurred over a 9-month period, and is exclusive of settlement amounts received from our insurers. Smith & Wesson entered into settlement agreements with two of its insurance carriers following years of coverage disputes. The settlement amounts equal a fraction of the total fees incurred by Smith & Wesson in defending against frivolous lawsuits. In fact, over the past 10 years, Smith & Wesson has spent millions of dollars defending itself against precisely the type of "junk" lawsuits that the legislation—

Referencing the legislation that is before us today—

is designed to prevent.

So they do openly support passage of the Protection of Lawful Commerce in Arms Act. They feel it is critical to not only the survival of Smith & Wesson but to the firearms industry of America.

I ask unanimous consent that the letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

SMITH & WESSON,
Springfield, MA, July 26, 2005.

HON. BILL FRIST,
Majority Leader, U.S. Senate, U.S. Capitol Building, Washington, DC.

DEAR SENATOR FRIST: This letter is in response to the Brady Center's newswire released yesterday regarding the Protection of Lawful Commerce in Arms Act. The newswire was entitled "The Biggest Lie Yet: Hoping to Ram Bill Through Senate, NRA Supporters Use Phony Scare Tactics, Says Brady Campaign.

In the article, the Brady Center attempts to minimize the financial implications that the numerous "junk" lawsuits have had on the firearms industry. To support their position, they cite, among other things, Smith & Wesson's most recent 10-Q, filed with the Securities and Exchange Commission. They quote Smith & Wesson's filing stating, "In the nine months ended January 31, 2005, we incurred $4,535 in defense costs, net of amounts received from insurance carriers, relative to product liability and municipal litigation."

As stated in our filing, the figure reported reflects fees incurred over a nine-month period, and is exclusive of settlement amounts received from our insurers. Smith & Wesson entered into settlement agreements with two of its insurance carriers following years of coverage disputes. The settlement amounts equal a fraction of the total fees incurred by Smith & Wesson in defending against frivolous lawsuits. In fact, over the past 10 years, Smith & Wesson has spent millions of dollars defending itself against precisely the type of "junk" lawsuits that the legislation is designed to prevent.

Passage of Protection of Lawful Commerce in Arms Act is obviously critical to Smith & Wesson, the firearm industry, our nation's economy and America's hunting traditions and firearm freedoms. Thank you for your sponsorship of this very important piece of legislation.

Very truly yours,

MICHAEL F. GOLDEN,
President and CEO.

Mr. CRAIG. I yield the floor.

The PRESIDING OFFICER. The Senator from Arkansas is recognized.

Mrs. LINCOLN. I ask unanimous consent to speak as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The remarks of Mrs. LINCOLN are printed in today's RECORD under "Morning Business.")

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. President, as most of our colleagues know, we are now on S. 397, the Protection of Lawful Commerce in Firearms Act. There is an amendment on the Senate floor for consideration at this moment. Cloture on the bill has been filed.

What I thought I might do is take a few moments to discuss some of the differences between S. 397, the one currently on the Senate floor, and S. 1805, the previous version of the Protection of Lawful Commerce in Firearms Act, which was considered in the Senate in the 108th Congress. Language has been added in this version to address developing issues or concerns expressed last Congress, garnering more support and adding more cosponsors on both sides.

As I announced this morning and submitted for the RECORD, we now have 61 cosponsors including myself. In some cases, the changes are just technical in their character.

But before I get to the changes, let me assure my colleagues that these changes do not alter the essential purpose and effect of the bill. As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry. Well recognized causes of action are protected by the bill. Plaintiffs can still argue their cases for violations of law, breach of warranty, and knowing transfers to dangerous persons. Specific language has been added to make it clear that the bill is not intended to prevent suits for damage caused by defective firearms or ammunition. The only lawsuits this legislation seeks to prevent are novel causes of action that have no history or grounding in legal principle.

This bill places blame where blame is due. If manufacturers or dealers break the law or commit negligence, they are still liable. However, if the cause of harm is the criminal act of a third person, this bill will prevent lawsuits targeting companies that have "deep pockets" but no control over those third persons.

The first change we made in this bill was to add the words "injunctive or other relief' in the title of the bill. This is to make sure S. 397 will prevent all qualified suits and respond to concerns that the 108th version would only have prevented suits for damages. The version of the bill before us today will prevent suits that seek injunctive or other relief besides those seeking only money damages. Without adding this language, law-abiding firearms businesses could still be crippled by being prevented from manufacturing or selling firearms. Any court decision that incorrectly finds dealers or manufacturers liable for criminal acts of others will destroy an industry whether there is an award of money damages or not.

In the "findings" section of the bill, we have made a couple of changes that do not alter but strengthen and clarify the second amendment principles that are reviewed there.

That same section contains a new paragraph responding to questions about the bill's Commerce Clause implications. That new section expresses the reality that the bill actually strengthens federalism and protects interstate commerce. Thirty-three states have already forbidden lawsuits like the ones this bill seeks to eliminate. Advocates of gun control are trying to usurp State power by circumventing the legislative process through judgments and judicial decrees. Allowing activist judges to legislate from the bench will destroy state sovereignty. This bill will protect it.

A new paragraph in the "purposes" section of the bill echoes this change.

In the "definitions" section of the bill spelling out what we mean by a "qualified civil liability action," we have added the words "or administrative proceeding . . .". This change responds to the experience of some in the industry, who have found themselves not only the target of junk lawsuits filed by a municipality but also the target of administrative proceedings, such as those to change zoning restrictions, also aimed at putting a law-abiding manufacturer or seller out of business just because it made or sold a firearm that was later used in a crime. However, it must be remembered that not all administrative proceedings involving someone in the firearms industry would be covered by this addition—only those that were "resulting from the criminal or unlawful misuse of a qualified product by the person [bringing the action] or a third party . . .". Let me emphasize: this change is not intended to, and would not, have the effect of preventing ATF or any other Federal, State, or local agency from using administrative proceedings to enforce Federal or State regulations that control the firearms business. So we are not trying to circumvent the Justice Department in any sense of the

arms to our Armed Forces are the same targets of these reckless lawsuits: Beretta, Bushmaster, Remington, Smith & Wesson.

These are the companies we rely on for small arms for the military.

But if the proliferation of lawsuits against them continues, it could jeopardize the supplies we receive and need for our military.

This bill does nothing more than prohibit—with five exceptions lawsuits against manufacturers or sellers of guns and ammunition for damages "resulting from the criminal or unlawful misuse" of nondefective guns and ammunition.

Let me repeat that: "resulting from the criminal or unlawful misuse" of nondefective guns and ammunition.

This bill is not a license for the gun industry to act irresponsibly. If a manufacturer or seller does not operate entirely within Federal and State law, it is not entitled to the protection of this legislation.

I should also note that this bill carefully preserves the right of individuals to have their day in court with civil liability actions where negligence is truly an issue, or where there were knowing violations of laws on gun sales.

It is also noteworthy that in a recent poll by Moore Information Public Opinion Research, 79 percent of Americans do not believe that firearms manufacturers should be held legally responsible for violence committed by armed criminals.

Seventy-nine percent!

And in this poll, 71 percent of Democrats hold this view. So this should not be a partisan issue.

Let me just read a postcard from one of the thousands of people who have written me in support of this bill from Utah. This Utahn, from the city of Hyde Park, writes:

Dear Senator Hatch: Please give your full support for S. 397 with no anti-gun amendments. As a business woman I know the strength of America is productive businesses that keep America strong and my fellow citizens employed!

These are the people I represent. I not only represent them, I am proud to be one of them. I am proud to help small businesses. And I am proud to help gun owners.

Let me just say a word about the precedents for this legislation. Congress has the power—and the duty—to prevent activists from abusing the courts to destroy interstate commerce.

We did this in the General Aviation Revitalization Act of 1994 where we protected manufacturers of small planes against personal injury lawsuits. That act superseded State law, as does the gun liability bill.

There are many other precedents for abusive lawsuit protection, including light aircraft manufacturers, food donors, charitable volunteers, medical implant manufacturers and makers of anti-terrorism technology, just to mention a few.

There is simply no reason the gun makers should have to continue to defend these types of meritless lawsuits. We must protect against the potential harm to interstate commerce. The gun industry has already had to bear over $200 million in defense costs thus far.

The bottom line is that this is a reasonable measure to prevent a growing abuse of our civil justice system.

The bill provides carefully tailored protections for legitimate lawsuits, such as those where there are knowing violations of gun sale laws, or those based on traditional grounds including negligent entrustment or breach of contract.

We simply should not force a lawful manufacturer or seller to be responsible for criminal and unlawful misuse of its product by others. We do not hold the manufacturers of matches responsible for arson for this same reason.

Individuals who misuse lawful products should be held responsible, not those who make the lawful products.

In closing, I leave my colleagues with one last thought.

These abusive gun liability actions usurp the authority of the Congress and of State legislators. They are an obvious and desperate attempt to enact restrictions that have been widely rejected.

It is for this reason that many States have enacted statutes to prevent this type of litigation. Congress should do the same.

As with class action lawsuits, the few States that allow jackpot jurisdictions can create a disastrous economic effect across the entire country, and across an entire industry.

We cannot allow this to happen. We must stop these abusive lawsuits.

I urge my colleagues to vote for this important legislation.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. BOND. I thank my colleague from Utah for relinquishing the rest of the time, and I join my colleague in strong support of S. 397, the gun liability bill. But I also wanted to address a topic that continues to draw much heat and discussion here on this floor and in the media. In the heat of political rhetoric over Iraq and the administration's prosecution of the global war on terror, much has been lost and not all the facts are being presented in the matter. Unfortunately, some are quick to exploit the situation in Iraq and the global war on terror and, by extension, the brave men and women prosecuting these conflicts as cannon fodder in their attacks on the President from the media and others. These folks hope to undermine the administration's credibility with a keen eye on gaining political advantage. However, in the end, those efforts serve only to undermine the noble efforts of our Armed Forces, the men and women of our intelligence community who take the fight to the enemy every day. Most damning, however, is that we have yet to see those who strongly criticize the President's policies present any comprehensive, workable or viable alternatives.

This kind of politicizing only serves to erode the morale of the men and women in the field who do the heavy lifting. It is nothing short of shameful when these warriors' leaders in Congress bicker about nonsubstantive issues while they in the field are united and committed to the missions of freedom and keeping our country safe. The armed conflicts in which our young men and women sacrifice so much should be the topic of thoughtful debate.

However, there is no place for this kind of posturing in the business of war because it merely emboldens the enemy and belittles the efforts of our troops.

Let's look at the facts. Some argue there is no connection between Iraq and 9/11. Look at the facts. In late 1994 or early 1995, Saddam Hussein met with a senior Iraqi intelligence officer in Khartoum. In March 1998, after bin Laden's public fatwah against the United States, two al-Qaida members reportedly went to Iraq to meet with Iraqi intelligence. In July, an Iraqi delegation traveled to Afghanistan to meet first with the Taliban and then bin Laden. "One reliable source reported bin Laden's having met with Iraqi officials, who 'may have offered him asylum'." These are quotes from the bipartisan 9/11 Commission Report published in July 2004.

I do not think one could argue that these facts are either agenda-driven or biased. These facts demonstrate that prior to the 9/11 attacks, al-Qaida and bin Laden himself maintained contacts with the Iraqi regime and that the Iraqis even offered to harbor bin Laden.

Accordingly, a categorical denial that "Iraq had nothing to do with 9/11" cannot be made responsibly.

Next contention: Iraq had and has nothing to do with the global war on terror. That is flat dead wrong. Hardly anyone can refute the fact that Iraq has become the gathering place for Sunni extremists who wish to wage war against the United States. From their optic, the terrorists have a plethora of targets with the presence of U.S. forces in Iraq. They are also motivated to combat our policy of fostering a pluralistic, open, and democratic government in Iraq. True meaning.

Instead, the terrorists wish to distort Islam's true meaning, wage an unholy war against Iraq's Shi'a, and induce a sectarian civil war during the aftermath of which the terrorists would like to establish a Taliban-like state in Iraq. These same terrorists are also motivated by their desire to evict U.S. forces not only from Iraq but from the Greater Arab Middle East, and they view our mission in Iraq as an act of occupation when it is a battle of liberation. The battle is one of hearts and minds; a battle, however, that the Iraqi people are determined to win, along with our assistance, as demonstrated

dealers. Others would require systematic monitoring of dealers' practices by manufacturers and distributors.

These are just a few of the sweeping demands made in the lawsuits that the Protection of Lawful Commerce in Arms Act seeks to stop. As you can tell, these suits are asking the courts to step well outside of their jurisdiction, to legislate regulation of the industry. They also have nothing to do with holding accountable those who actually misuse the firearms.

Most courts have dismissed such lawsuits that are brought before them. A New York appellate court judge stated:

> The plain fact is that the courts are the least suited, least equipped, and thus the least appropriate branch of government to regulate or micromanage the manufacturing, marketing, distribution, and sale of handguns.

However, the time, expense, and effort that goes into defending these nuisance suits is a significant drain on the firearms industry, costing jobs and millions of dollars, increasing business operating costs, including skyrocketing insurance costs, and threatening to put dealers and manufacturers out of business. That is why this bill is so necessary.

Let me be clear about a couple the things. This bill will not close the courthouse doors to legitimate suits against the firearms industry. It will not shield the industry from its own wrongdoing or from its negligence or if the industry puts out a bad product. For example, the bill will not require dismissal of a lawsuit if a member of the industry breaks the law or if someone in the industry acts negligently in supplying a firearm to someone they have reason to believe is likely to misuse the firearm or supplies a firearm to someone they had reason to know was barred by Federal law from owning a firearm or a representative of the industry who designs a defective product. The bill also doesn't protect unlicensed dealers. The bill would only protect federally licensed manufacturers, dealers, or importers of firearms.

This bill is only intended to protect law-abiding members of the firearms industry from nuisance suits that have no basis in current law, that are only intended to regulate the industry or harass the industry or put it out of business, none of which are appropriate purposes for a lawsuit.

Certainly, regulating the industry is well outside the appropriate role of the courts.

We could all agree that when a firearm is used in a criminal or careless manner that causes serious injury or loss of life, that is a terrible tragedy. Those responsible should be punished to the full extent of the law in both the civil and criminal areas. That includes the firearms industry, if one of its members breaks the law or acts negligently in selling a firearm to a criminal or other person they should have known would use the firearm to hurt another person. The Protection of Lawful Commerce in Arms Act will do nothing to change that or shield the arms industry from criminal wrongdoing.

At the same time, it is not right or fair to hold law-abiding members of the industry accountable for independent actions of third parties who use a firearm in a manner that industry never intended. Why, for example, should the industry be held liable if a member of the industry sells a gun to a lawful customer and that gun is then stolen from a customer and used in a crime? That makes no sense.

Again, the fact that a crime occurred is sad and tragic, but that doesn't mean that the firearms industry is in any way responsible for such a gross misuse of its product. But that is exactly what is happening in some of these lawsuits. This bill would put a stop to that. It is a very short, simple bill with a simple purpose. Nothing is hidden in it. It is also critically important to a vital national industry. We need to pass it, pass it now, as the situation will only get worse. I ask my colleagues to give it their full support.

Mr. BAUCUS. Mr. President, I ask unanimous consent to speak as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

HEALTH CARE AND COMPETITIVENESS

Mr. BAUCUS. Mr. President, every few minutes, a new Chevy Malibu, a popular family sedan, rolls off the assembly line of General Motors Corporation's Fairfax plant Kansas City, KS. The invoice price starts at $17,600.

And every few minutes, across the ocean, a new Toyota Camry, a popular family sedan, rolls off the assembly line of the Toyota Motor Corporation plant in near Nagoya, Japan. The invoice price starts at about $16,600, a full $1,000 less than the Malibu.

One reason for the price difference between the Malibu and the Camry is health care. Yes, health care. For GM, health care costs amount to more than $1,500 for every vehicle it produces. For Toyota, health care costs account for closer to $500 for every vehicle that it produces. That is about the thousand dollars difference.

Two-thirds of Americans get their health insurance at their jobs. The system started in World War II, when the Government capped wages. Employers competed for workers by offering more generous fringe benefits. After the war, a Government tax preference further encouraged employers to provide health insurance.

Almost all Japanese get their health insurance through their government. That is true of pretty much every other major industrialized country.

America's system has yielded high health care costs. The average American spends more than $5,000 a year on health care. That is 53 percent more than the next most costly country. The average Japanese spends only about $2,000 a year on health care.

Last year, GM paid $3.6 billion in health care costs for about 450,000 retirees and their spouses. When GM workers retire, GM continues to pay much of their health care costs as part of the worker retiree benefits plan.

This year, 1,200 Japanese Toyota employees will retire. Within 2 years, pretty much every one of them will switch from Toyota's health insurance plan to the Japanese national plan. At that point, Toyota will pay absolutely nothing in health care costs for those 1,200 retirees and their spouses.

General Motors provides more medical benefits than any other private entity. GM covers 1.1 million Americans, including workers, retirees, and their families. Last year, GM paid for more than 11 million prescriptions for its hourly workers.

Premiums for health insurance have increased 15 percent or more in many years. GM expects that its health care bill will go up $1 billion this year, to $6.2 billion total. That is a year. Last year, GM spent $1.4 billion on prescription drugs alone. Last year, GM put $9 billion into a trust fund to pay for health care costs.

Remember, when those retirees leave Toyota, they do not cover the health care costs. The government does it in Japan.

In the late 1970s, GM controlled nearly half of the American car market. Since then, competitors such as Toyota, Nissan, and Honda have cut GM sales to about a quarter of the American market.

In the fiscal year ending March 2004, Toyota earned $10 billion in profits. GM has now been losing money for three quarters in a row. GM lost more than a billion dollars in the first quarter of this year alone.

Toyota is making nearly $1,500 a car in profit. GM is losing more than $2,300 per car.

Now, part of the blame for GM's declining market share lies with GM's inability to adjust to change. In the wake of the OPEC oil embargo, Japanese car makers sold low-cost, fuel-efficient cars to American families. But OPEC imposed its oil embargo more than 30 years ago, and Japanese car companies still lead the way in energy-efficient cars. Today, only Toyota and Honda mass produce fuel-efficient hybrid sedans.

But part of the blame also lies with the American health care system. Carrying the burden of health care costs handicaps American companies in their race for global markets.

Americans are smart. Americans work hard. But American manufacturers cannot compete with foreign manufacturers when American companies have to bear the extra load of these higher health care costs.

You might think that because Americans pay more for health care, well, at least we get better health care. But we do not.

The average American does not have better access to health services. Forty-five million Americans lack health insurance. Fifteen percent of our population is uninsured. Japan offers better

Guns in Maryland, Southern Police Equipment in Richmond—all across the country—Atlantic Gun and Tackle in Bedford Heights, OH. Hundreds of guns are sold and are ending up at crime scenes. If they are this blatant and reckless now, what do they do when we say, "Don't worry, no one can touch you"? It will create huge disincentives.

Finally, what we are doing today is silencing the voices of victims of gun violence, silencing people who have been wronged through the negligence of another. This is not about trying gun manufacturers for someone else's fault, this is about their own responsibility.

Think tonight about what happened in Washington with the snipers. An FBI employee loading material at a Home Depot parking lot—shot. Some of that was attributed to the negligence of a gun dealer. That lady's husband and family would be silenced. Think about the young boy walking to his school in Maryland—shot. His family would be silenced. Think about the cabdriver filling up his cab. Tonight when we fill up our cars, think for a second, what if you were struck down, caught up in that web of violence. What if your family knew part of that was the result of the negligence of a gun dealer, a gun manufacturer. Who will take care of your family? Who will take care of you if you are paralyzed? We are telling those good people, our constituents: You are not worth it; the NRA is more important. You will suffer. If you don't have the money, you will be on charity. That will take care of you.

This is wrong. It is wrong morally, it is wrongly legally. We should vote against this legislation. I passionately hope we do.

I yield back my time.

Mr. ALLEN. Mr. President, I rise today in strong support of the Protection of Lawful Commerce in Arms Act.

Contrary to the ooncept of individual responsibility—for the past decade, the U.S. firearms industry has been under assault by legal activists attempting to hold this industry somehow legally responsible for the criminal conduct of others. Some of these suits are intended to drive gunmakers out of business by holding manufacturers and dealers liable for the criminal acts of others. It has been reported to me that to date, the total cost for the firearms industry in defending themselves from these suits exceeds $200 million.

Moreover, these lawsuits seek a broad range of remedies relating to product design and marketing. Their demands, if granted, would create major impediments on interstate commerce in firearms and ammunition, including unwanted design changes, overly burdensome sales policies, and higher costs for purchasers.

S. 397, which we are in the midst of debating, is desirable legislation and I am proud to be a cosponsor of this bill. This legislation will help curb frivolous litigation against a lawful American industry and the thousands of the men and women it employs. Imagine if General Motors or an auto dealer were to be held liable for an accident caused by a reckless or drunk driver in one of their manufactured vehicles or sue Budweiser. Likewise, businesses legally engaged in manufacturing or selling firearms should not be liable for the harm caused by people who use that firearm in an unsafe or criminal manner. This legislation does carefully preserve the right of individuals to have their day in court with civil liability actions for injury or danger caused by negligence on the firearms dealer or manufacturer or defective product, a standard in product liability law.

Moreover, these frivolous lawsuits against honest, legal companies put our national security and our military at risk. Since the late 1980's, the U.S. military has relied on private industry to supply our soldiers, our sailors, our airmen, and our marines. In 2004–2005 alone, the military has contracted to buy more than 200,000 rifles, sidearms and machine guns. And these numbers do not include new purchases for our Federal law enforcement agencies, such as the Department of Homeland Security. In addition, the Army fires about 2 billion rounds of ammunition each year. While the Army does manufacture a portion of that ammunition, it purchases half of its ammunition from private companies.

The bottom line is, these frivolous lawsuits can shut down the very same companies that are supplying our armed forces, our Federal law enforcement agencies, and our local and State police. Even the Department of Defense understands the implications that these lawsuits have on the firearms. In a letter dated July 27, 2005, from the Department to my colleague, Senator SESSIONS, DoD states, "We believe that passage of S. 397 would help safeguard our national security by limiting unnecessary lawsuits against an industry that plays a critical role in meeting the procurement needs of our men and women in uniform." That is from the Department of Defense, not something created by the NRA or the proponents of this legislation.

This legislation enjoys broad support. In addition to the NRA, business and insurance groups such as the National Association of Manufacturers, U.S. Chamber of Commerce, National Association of Wholesaler-Distributors, National Federation of Independent Business, and the American Insurance Association all support S. 397. These lawsuits pose a threat to any business that makes or sells any lawful, nondefective product that can be misused by third parties.

National and local unions such as the United Auto Workers, International Association of Machinists and Aerospace Workers, and United Mine Workers support this bill because the firearms and ammunition industry provides good jobs for working Americans.

National hunting and wildlife conservation groups support S. 397, because excise taxes on firearm and ammunition sales fund wildlife management projects in the States. If these lawsuits wipe out the industry, these funds will vanish.

This bill is not a gun control bill; we should save that debate for another time. We should not saddle this lawsuit abuse legislation with anti-gun amendments that seek to infringe upon the Second Amendment rights of Virginians and Americans ability to protect themselves and their families. If Senators need to look to gun control, the best gun control measures are to enforce existing gun laws, which do more to keep illegal guns out of the hands of criminals than passing new and additional burden on the sale of firearms to honest gun-owners. Criminals commit gun-related crimes and we should focus our attention on these criminals rather than further restricting the rights of law-abiding citizens.

S. 397 will stop lawsuits that are designed not to recover damages from criminal or culpable parties, but which are designed to financially damage the industry or force regulatory changes that would restrict their legal business and strangle second amendment rights across the Nation. We have a responsibility to protect those rights and to stop the use of the courts to usurp legislative prerogatives.

I respectfully urge my colleagues to support this legislation and to oppose extraneous amendments that would weaken or delay it from passing. Please protect the rights of our constituents and the legal business that is unjustly threatened by these reckless lawsuits; and let us preserve the balance between the legislative and judicial branches of government.

Mrs. BOXER. Mr. President, this bill is part of the special interest agenda being pushed by the NRA and the Republican leader. First they managed to stall the reauthorization of the assault weapon bank, even though the bill saved lives and kept out police officers safer. Now they are looking to grant sweeping protections to gun manufacturers and dealers who recklessly sell guns that cause thousands of deaths in this country each year.

Contrary to what supporters of this bill are saying, this is not "tort reform" and this will not, as the White House said, "help curb the growing problem of frivolous lawsuits."

They call this bill the "Protection of Lawful Commerce in Arms Act." They give it a nice name to make it sound like they are protecting trade. What if we called it the "Shield Gun Makers From Lawsuits When Their Defective Gun Blows Your Child's Arm Off Act?" Or, "You're Off the Hook if You Sell Guns to Criminals and They Use Those Guns to Murder People Act?" I guess those names just don't have the same ring to them.

How about a little truth in advertising here—"Protect the Unlawful Commerce in Arms Act?" I don't think so. Make no mistake, this bill is an

STATE OF INDIANA	)	LAKE SUPERIOR COURT
	) SS:	CIVIL DIVISION, ROOM FIVE
COUNTY OF LAKE	)	HAMMOND, INDIANA

CITY OF GARY, INDIANA, by its Mayor, SCOTT L. KING, Plaintiff,	)	CAUSE NO. 45D05-0005-CT-00243
vs.	)	
SMITH & WESSON CORP., et al., Defendants.	)	

ORDER OF OCTOBER 23, 2006

INTRODUCTION

This matter came before the Court upon the Motion to Dismiss, or in the alternative, Motion for Judgment on the Pleadings, filed by the following Defendant Manufacturers: SMITH & WESSON CORP., BERETTA U.S.A. CORP., COLT'S MANUFACTURING COMPANY, INC., BROWNING ARMS COMPANY, B.L. JENNINGS, INC., BRYCO ARMS CORPORATION, GLOCK INC., BEEMILLER, INC., d/b/a HI-POINT FIREARMS i/s/h/a HI-POINT FIREARMS CORP., PHOENIX ARMS, STURM, RUGER & COMPANY, INC., and TAURUS INTERNATIONAL MANUFACTURING, INC. (hereinafter, "Manufacturers").

The basis for Manufacturers' motion is the Protection of Lawful Commerce in Arms Act (hereinafter, "PLCAA"). The PLCAA, codified at 15 U.S.C. § 7901 *et seq.*, became law on October 26, 2005. Manufacturers contend that the PLCAA applies to this case and that the PLCAA provides for the immediate dismissal of this matter.

The Plaintiff, City of Gary, (hereinafter, "City") has filed a Memorandum in Opposition to the Manufacturer's motions and contends that the PLCAA does not apply or is unconstitutional.

FACTS

On August 27, 1999, the City brought this action against the Manufacturers and asserted

various claims, including public nuisance and negligence claims. One of the remedies sought by the City was compensatory damages. The City also requested injunctive relief and punitive damages. The City charged that the Manufacturers engaged in "wilful, deliberate, reckless, and negligent distribution of guns" to criminals and high-risk gun dealers, that the Manufacturers refused to take reasonable steps to control the distribution of their hand guns and the Manufacturers negligently designed unsafe hand guns. The Manufacturers moved to dismiss the original complaint for failure to state a claim. The trial court granted the Manufacturers' motion. The City appealed.

Ultimately, the Indiana Supreme Court held that the City presented valid claims for public nuisance, negligent sales, and negligent design. The case was remanded for further proceedings. See, City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222 (Ind. 2003). During the pendency of this case, Congress enacted, and the President signed into law, the PLCAA. The PLCAA became law on October 26, 2005. In a nutshell, the PLCAA provided a bar to the commencement of a "qualified civil liability action" in state or federal court, and required state and federal courts to immediately dismiss any pending actions or those subsequently brought. The Manufacturers claim this case falls within the purview of the PLCAA and moved to dismiss this case pursuant to the mandate of the act. The City challenges the constitutionality of the PLCAA on the following grounds.

I. The PLCAA is unlawful preemption;

II. The PLCAA's retroactive abolition of pending state court cases violates Due Process;

III. The PLCAA violates the Principles of Separation of Powers;

IV. The PLCAA violates the Tenth Amendment and Eleventh Amendments.

ISSUES

I. Whether the PLCCA is Unlawful Preemption

The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land ...." U.S. Const. art. VI, cl.2. As such, Congress has the power to trump state legislation in an area where there is federal regulatory authority. Preemption may be expressly provided for in a federal statute or implied. Further, preemption may be complete or partial. In order for the federal action to be a valid exercise of preemption, it must first be a valid exercise in federal power. Thus, the first inquiry is whether Congress had the power to pass the PLCAA. With regard to this threshold inquiry, the Commerce Clause, U.S. Const. art I §8, confers upon congress the power to regulate activities that substantially impact interstate commerce. Gonzales v. Raich, 125 S.Ct. 2195 (2005). Clearly, this case implicates interstate commerce and therefore the Commerce Clause provides Congress with legislative power in this area. Further, the language of the PLCAA is clear that Congress expressly intended to preempt state tort law in the area of gun manufacturers state tort liability. Since the Commerce Clause provides Congress power to enact the PLCAA to preempt state tort law then preemption is of no moment. The inquiry next turns to whether the PLCAA is constitutionally firm on the other challenged grounds.

II. Whether the PLCAA'S Retroactive Abolition of Pending State Court Cases Violates Due Process

Due Process Clauses of the Fifth Amendment guarantee a right to a remedy for injuries to life, liberty, and/or property rights. United States Supreme Court has recognized that laws that eliminate common law causes of action may violate due process. In *Poindexter v Greenhow*, the Court held, "it is not within the powers of the state to deny a person all redress for a deprivation of rights secured by the constitution and that to take away a remedy is to take away the right

itself." *Poindexter v Greenhow*, 114 U.S. 270 (1885). Under the PLCAA gun manufacturers would not have any responsibility for foreseeable harm caused by negligence in producing and distributing weapons and those harmed, past, present, and future would be wholly without a remedy in state and federal court. Under the Fifth Amendment, the City had a substantial, protectable interest in its tort claim. Inherent in the Due Process Clause, is a "separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury*, 536 U.S. 403 (2002). It is acknowledged that Congress may regulate remedies or even limit state court remedies. Due Process is violated when Congress abolishes an existing remedy and provides no alternative. To deprive the City of its right in interest deprives the City of a vested cause of action without just compensation; thereby, the PLCAA is violative of the Due Process Clause and, therefore, unconstitutional.

Further, our Supreme Court has long recognized laws that are applied retroactively and/or laws that serve as a deprivation of existing rights are particularly unsuited to a democracy such as ours. Our sovereign's distaste for retroactivity was discussed in *Landgraf v USI Film Prods.*, 114 S.Ct. 1483 (1994). In *Landgraf*, the Court stated:

> "The presumption against retroactive legislation is deeply rooted in our jurisprudence, it embodies a legal doctrine centuries older than the Republic."

Our founding fathers were very aware of the pit-falls of retroactive legislation and have safe guarded the Republic with various provisions of the Constitution, including the *Ex-Post Facto* clause, the Fifth Amendment's Takings Clause, prohibitions on Bills of Attainder, and our Due Process clause. In discussing these principles against retroactive statutes, the *Landgraf* Court stated:

> "These provisions demonstrate that retroactive statutes raise particular concerns the legislatures unmatched power allow it to sweep away settled expectations suddenly and without individualized

> consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals...restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Landgraf*, 114 S.Ct. 1483.

While it is recognized that *Landgraf* was a case involving an analysis as to whether or not retroactive application was implied by the statute in question rather than expressly provided for, *Landgraf* nevertheless sets forth sound reasons for close review of statutes with retroactive affect. Additionally, the suspect and unjust nature of retrospective legislation was examined in *Kaiser Aluminum & Chemical Corp. v Bonjorno*, as follows:

> "The United States Constitution itself so far reflects these sentiments that it proscribes all retroactive application of punitive law and prohibits (or requires compensation for) all retroactive laws that destroy vested rights."

Kaiser Aluminum & Chemical Corp. v Bonjorno, 110 S.Ct. 1570, 1587 (1990). (Internal citations omitted). Further, the *Kaiser* Court recognized that retrospective laws are highly injurious, oppressive, and unjust, and that retrospective laws should not be made either for the decision of civil causes or the punishment of offenses.

In the case at bar, the retroactive legislation may not be a means of retribution against unpopular groups or individuals; however, it is clearly an act which was passed in response to pressure from the gun industry. Further, it is clear that the PLCAA destroys the City's cause of action and valid state court remedies. These vested rights may not be destroyed by legislative fiat without violating our Constitution. As such, the retroactive abolition of an existing state cause of action is unconstitutional since its retroactive affect is an unconstitutional deprivation of existing

rights, and is an unconstitutional *Ex-Post Facto* law.

III. **Whether the PLCAA Violates Principles of Separation of Powers**

Further, in *United States v Klein*, 80 U.S. 128 (1872), the United States Supreme Court established an Article III limitation on congressional law making power. The holding in *Klein* was simply that Congress cannot, through legislation, direct the outcome of pending cases since to do so would infringe upon the judiciaries role in deciding cases and violate the Separation of Powers as guaranteed by the Constitution. The scope of the PLCAA clearly and unmistakably directs the outcome of this pending case; and, therefore, is a clear and unmistakable violation of the Separation of Powers as guaranteed by the Constitution; and is, therefore, unconstitutional.

IV. **Whether the PLCAA Violates the Tenth Amendment and Eleventh Amendment**

The Tenth Amendment sets forth: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Recent Supreme Court decisions have set forth an increased protection of state sovereignty through restrictions on congressional law making power where congressional acts are deemed "commandeering of state governments." See *Printz v United States*, 117 S.Ct. 2365 (1997). In *Printz*, the Supreme Court held that federal legislation known as the Brady Handgun Violence Prevention Act (hereinafter, "Brady Act") was unconstitutional because it required state law enforcement officers to temporarily work for the federal government. The Brady Act created a national system of instant background checks with regard to gun purchases. The Brady Act required local law enforcement to process identification forms in an attempt to verify the legality of gun purchases. The Supreme Court held that:

"Congress cannot compel the States to enact or enforce a federal

> regulatory program...[or] circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the states to address particular problems, nor command the State's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Prinz*, 521 U.S. at 935.

Under the Tenth Amendment, the federal government may not dictate that state court officers take action to enforce a federal program; to do so would be commandeering of state power. The PLCAA, in the instant case, is not commandeering of state judicial power because, amongst other things, it allows the state court judge to determine whether the act applies in first instance. Further, the PLCAA does not implicate any state immunity from suit. As such, the PLCAA does not violate the Tenth or Eleventh Amendments.

CONCLUSION

Upon the points and authorities cited herein, the PLCAA is unconstitutional; and, therefore, the Motion to Dismiss and Motion for Judgment on the Pleadings filed by the Defendant Manufacturers are DENIED

ALL OF WHICH IS ORDERED October 23, 2006.

Robert A. Pete

ROBERT A. PETE, JUDGE

Corporan v. Wal-Mart Stores East, LP

United States District Court for the District of Kansas

July 18, 2016, Decided; July 18, 2016, Filed

Case No. 16-2305-JWL

Reporter
2016 U.S. Dist. LEXIS 93307 *

Melinda K. Corporan, heir at law of Reat Underwood, and Administratrix and personal representative of the Estate of Reat Underwood, Plaintiff, v. Wal-Mart Stores East, LP and Wal-Mart Stores, Inc., Defendants.

Prior History: Corporan v. Wal-Mart Stores E., 2016 U.S. Dist. LEXIS 91106 (D. Kan., July 12, 2016)

Core Terms

firearm, dealer, Gun, purchaser, allegations, buyer, requires, seller, negligence per se, negligent entrustment, motion to dismiss, manufacturer, straw, federal statute, incompetent, submissions, predicate, prospective purchaser, federal gun control, knowingly, certify, amend, kill

Counsel: **[*1]** For Melinda K. Corporon, heir at law and administratrix and personal representative of the Estate of deceased, Reat Underwood, Plaintiff: David R. Morantz, Lynn R. Johnson, LEAD ATTORNEYS, Shamberg, Johnson & Bergman, Chtd. - KCMO, Kansas City, MO; Paige L. McCreary, LEAD ATTORNEY, Shamberg, Johnson & Bergman, Chartered, Kansas City, MO.

For Wal-Mart Stores East, LP, Wal-Mart Stores, Inc., Defendants: J. Andrew L. Richardson, Mary Quinn Cooper, LEAD ATTORNEYS, PRO HAC VICE, McAfee & Taft, PC - Tulsa, Tulsa, OK; Michael E. Brown, William H. Henderson, LEAD ATTORNEYS, Kutak Rock LLP - Kansas City, Kansas City, MO.

Judges: John W. Lungstrum, United States District Judge.

Opinion by: John W. Lungstrum

Opinion

MEMORANDUM & ORDER

Plaintiff Melinda K. Corporon is the mother of Reat Underwood, who was shot and killed by Frazier Glenn Cross, Jr., a/k/a Frazier Glenn Miller ("Miller"). Plaintiff is also the Administratrix of the Estate of Reat Underwood. The shotgun utilized by Miller to kill Dr. Corporan was sold by defendants to John Mark Reidle, who transferred the gun to Miller after he purchased it. Plaintiff filed a state court petition against defendants alleging that defendants negligently sold the shotgun to Reidle, **[*2]** a straw purchaser, with knowledge that Reidle was falsely representing himself as the actual buyer of the firearm. Defendants thereafter removed the case to this court on the basis of diversity jurisdiction under *28 U.S.C. § 1332*. This matter is presently before the court on defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim (doc. 10). As will be explained, the motion is granted in part and denied in part and plaintiff shall file an amended complaint no later than Friday, July 29, 2016.

Standard

In analyzing defendants' Rule 12(b)(6) motion, the court accepts as true "all well-pleaded factual allegations in the complaint and view[s] them in the light most favorable to the plaintiff." Burnett v. Mortgage Elec. Registration Sys., Inc., 706 F.3d 1231, 1235 (10th Cir. 013) (citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868, (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929, (2007))). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Lebahn v. National Farmers Union Uniform Pension Plan, 828 F.3d 1180, 2016 U.S. App.

LEXIS 12708, 2016 WL 3670007, at *2 (10th Cir. July 11, 2016) (quoting Iqbal, 556 U.S. at 678). It is not enough for the plaintiff to plead "labels and conclusions" or to provide "a formulaic recitation of the elements of a **[*3]** cause of action." *Id.* (citations omitted).

Background

Consistent with the applicable standard, the following facts are taken from the complaint and accepted as true for purposes of this motion.[1] On April 9, 2014, Miller and Reidle entered a Wal-Mart Supercenter in Republic, Missouri. Miller is a convicted felon who is prohibited by law from purchasing firearms. In the presence of at least one Wal-Mart salesperson, Miller selected a Remington shotgun and initiated its purchase. Miller then claimed that he did not have any identification with him and "offered that Reidle would complete the purchase." Reidle, in the presence of Miller and at least one Wal-Mart employee, completed the requisite Form 4473 in which he falsely identified himself as the actual buyer of the firearm.[2] According to plaintiffs, defendants assisted Reidle in completing Form 4473 and then sold the firearm to Reidle, who thereafter transferred it to Miller. On April 13, 2014, Miller used the Remington shotgun to shoot and kill Reat Underwood and his grandfather in the parking lot of the Jewish Community Center in Overland Park, Kansas. Based on these facts, plaintiff has sued defendants for negligence, negligent entrustment, **[*4]** negligence per se and aiding and abetting a straw purchase of a firearm.

[1] As noted earlier, plaintiff initially filed her claims in a state court petition. Nonetheless, the court uses the term "complaint" as defendants have removed the case to federal court and the federal rules and relevant case law use the term "complaint" rather than "petition."

[2] The Bureau of Alcohol, Tobacco, Firearms, and Explosives requires that buyers complete Form 4473 accurately and truthfully before purchasing a firearm from a federal firearms licensee. United States v. Reed, 599 Fed. Appx. 827, 829 n.3 (10th Cir. 2014). Among other things, Form 4473 seeks to prevent straw purchases of firearms and, toward that end, requires a prospective purchaser to certify that he is the actual buyer and that he is not acquiring the firearm on behalf of another person. United States v. Reese, 745 F.3d 1075, 1078 (10th Cir. 2014). Form 4473 also requires the dealer to certify that the dealer believes, based on the information disclosed in the form, that it is not unlawful for the dealer to transfer the firearm to the prospective purchaser. *See* Shawano Gun & Loan, LLC v. Hughes, 650 F.3d 1070, 1073 (7th Cir. 2011).

PLCAA Immunity

Defendants move to dismiss the entirety of plaintiff's complaint based on the immunity provided by the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 et seq. ("PLCAA"). The PLCAA was enacted in 2005 and **[*5]** generally prohibits claims against firearms and ammunition manufacturers, distributors, dealers, and importers for damages and injunctive relief arising from the criminal or unlawful misuse of firearms and ammunition, unless the suit falls within one of six enumerated exceptions. 15 U.S.C. §§ 7901-7903. The PLCAA requires that federal courts "immediately dismiss[ ]" a "qualified civil liability action." 15 U.S.C. § 7902(b).

> The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include [specified enumerated exceptions.]

Id. § 7903(5)(A). The parties do not dispute that this case meets all the elements of that general definition as applied to defendants—it is a "civil action" brought by a "person" for damages and other relief to redress harm "resulting from the criminal . . . misuse of a qualified product by . . . a third party." *Id.* Additionally, **[*6]** defendants are "seller[s] of a qualified product," *id.*, because they distributed the firearm used in the shooting, *see id.* § 7903(6) (defining "seller").

The PLCAA therefore requires dismissal of plaintiff's complaint if none of the specified exceptions applies. *See* Ileto v. Glock, Inc., 565 F.3d 1126, 1132 (9th Cir. 2009). Stated another way, plaintiff's state law negligence claims must fall into one the exceptions enumerated in the PLCAA before plaintiff will be permitted to proceed with her claims. Plaintiffs argue that the third exception, § 7903(5)(A)(iii), applies. Under that exception, the PLCAA does not preempt

> an action in which a manufacturer or seller of a qualified product *knowingly violated a State or Federal statute applicable to the sale or marketing of the product*, and the violation was a proximate cause of the harm for which relief is sought, including—

> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition **[*7]** of a qualified product; or
>
> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of *section 922* of Title 18[.]

Id. § 7903(5)(A)(iii) (emphasis added). This exception has come to be known as the "predicate exception," because a plaintiff not only must present a cognizable claim, he or she also must allege a knowing violation of a "predicate statute." *Ileto v. Glock, Inc., 565 F.3d 1126, 1132 (9th Cir. 2009)* (citing cases). That is, a plaintiff must allege a knowing violation of "a State or Federal statute applicable to the sale or marketing of the product." *15 U.S.C. § 7903(5)(A)(iii)*. In her complaint, plaintiff alleges that defendants knowingly violated certain specific provisions of the Gun Control Act of 1968, *18 U.S.C. §§ 921-931*: making a false statement "material to the lawfulness of the sale" in violation of *§ 922(a)(6)*; making a false statement "with respect to information required by [the Act] to be kept" by the dealer in violation of *§ 924(a)(1)(A)*; making a false entry in or failing to make an appropriate entry in any record which the dealer is required to keep **[*8]** under the Act in violation of *§ 922(m)*; and selling or disposing of a firearm to a person who he knows or has reasonable cause to believe has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year in violation of *§ 922(d)(1)*.[3]

The allegations in the complaint do not plausibly support a claim that defendants violated *§ 922(d)(1)*. There are no allegations in the complaint that defendant knew or should have known that Miller was a convicted felon and plaintiff does not suggest otherwise in her submissions. The remaining statutes identified by plaintiff, as they relate to this case, involve defendants' role in completing and maintaining Form 4473. The Bureau of Alcohol, Tobacco, Firearms, and Explosives requires that buyers complete Form 4473 accurately and truthfully before purchasing a firearm from a federal firearms licensee. *United States v. Reed, 599 Fed. Appx. 827, 829 n.3 (10th Cir. 2014)*. Federal firearms licensees must maintain these records. *Id.* Among other things, Form 4473 seeks to prevent straw purchases **[*9]** of firearms and, toward that end, requires a prospective purchaser to certify that he is the actual buyer and that he is not acquiring the firearm on behalf of another person. *United States v. Reese, 745 F.3d 1075, 1078 (10th Cir. 2014)*. Form 4473 also requires the dealer to certify that the dealer believes, based on the information disclosed in the form, that it is not unlawful for the dealer to transfer the firearm to the prospective purchaser. *See Shawano Gun & Loan, LLC v. Hughes, 650 F.3d 1070, 1073 (7th Cir. 2011)*. A dealer violates the Gun Control Act—and the specific provisions highlighted by plaintiff—if the dealer transfers a firearm based upon information in Form 4473 that he knows or has reason to believe is false. *Id.* (citing *18 U.S.C. §§ 922(m)* and *924(a)(1)(A)*).

Defendants highlight in their submissions that the complaint is devoid of any allegations that defendants made any false entries or false statements in connection with the Form 4473—only that Reidle did so. This is an accurate characterization of the complaint. As noted above, however, Form 4473 requires the dealer to certify in writing that the dealer believes, based on the information disclosed in the form, that it is not unlawful for the dealer to transfer the firearm to the prospective purchaser. The blank Form 4473 submitted by plaintiff confirms that the seller's **[*10]** signature and certification is required. Assuming, then, that plaintiff could amend her complaint to include the allegation that Form 4473 was signed by a salesperson with knowledge of the transaction (an allegation that plaintiff makes in her submissions), then plaintiff will have alleged sufficient facts, together with other facts alleged in the complaint, to support a plausible claim that defendants certified to their belief that the sale was lawful when, in fact, they had knowledge that Reidle was not the actual buyer of the firearm. Those other allegations include the fact that Miller, in the presence of a Wal-Mart salesperson, selected the firearm and initiated the purchase of the firearm, but offered up Reidle to complete the purchase after claiming that he did not have identification with him. The court, then, will permit plaintiff an opportunity to amend her complaint to include allegations concerning the certification provided

[3] While plaintiff generally alleges in her petition that defendants also violated "various . . . state laws," she does not identify in her petition or in her submissions any specific state statutes allegedly violated by defendants.

by defendants on Form 4473.

Assuming that plaintiff amends her complaint as described here, her claims are sufficient to survive the PLCAA filter. *See* Chiapperini v. Gander Mountain Co., 48 Misc. 3d 865, 13 N.Y.S.3d 777, 787 (N.Y. Sup. Ct. 2014) (denying in large part defendant's motion to dismiss based on PLCAA immunity where plaintiffs alleged **[*11]** that straw purchaser and actual buyer visited store together but straw purchaser made no inquiries about guns and paid with cash provided by actual buyer); *see also* Shawano Gun & Loan, LLC v. Hughes, 650 F.3d 1070 (7th Cir. 2011) (affirming district court's decision that defendant had reason to believe that purchaser was not actual buyer of firearm where purchaser had the same last name and/or address as a person whose application to purchase the firearms was denied either that day or the previous day).

The cases relied upon by defendants in their motion do not persuade the court otherwise. In *Ileto*, the Ninth Circuit held that the plaintiffs had not alleged the violation of any separate federal or state statute and, accordingly, could not satisfy the requirements of the predicate exception of the PLCAA in connection with their claims against a gun manufacturer. 565 F.3d at 1133. Here, of course, plaintiffs have alleged violations of the federal Gun Control Act. In Phillips v. Lucky Gunner, LLC, 84 F. Supp. 3d 1216 (D. Colo. 2015), the district court also held that the plaintiffs, who sued a firearm dealer, could not satisfy the predicate exception because the purchaser of the firearm admittedly had "no human contact" with the dealer and all sales were made online. Id. at 1224. The dealer, then, had no reason to know, as alleged by plaintiffs, **[*12]** that the purchaser was addicted to a controlled substance or was patently dangerous. By contrast, plaintiffs here allege that defendants had direct contact with Reidle and Miller and, based on the circumstances, knew that Reidle was not the actual buyer of the firearm. In the third case cited by defendants, Jefferies v. District of Columbia, 916 F. Supp. 2d 42, 46 (D.D.C. 2013), a teenager was killed in a random shooting by an AK-47 assault rifle and her estate sued the manufacturer of the gun for negligence. The district court sua sponte dismissed the case under the PLCAA on the grounds that the PLCAA barred suits against gun manufacturers for injuries caused by the private, criminal use of their guns and that no exception plausibly applied to the facts alleged. Id. at 45-46. *Jefferies*, then, is readily distinguishable from the case presented here. Finally, in the last case cited by defendants, Estate of Kim ex rel. Alexander v. Coxe, 295 P.3d 380, 386 (Alaska 2013), the court held that the plaintiff could not establish a "knowing violation" of a federal or state statute if the evidence undisputedly showed that the firearm was stolen from the dealer. Id. at 394. The court, however, recognized that if a factual dispute existed as to whether the dealer sold the rifle or otherwise transferred the rifle, then summary judgment was not appropriate. **[*13]** *See id.*

For the foregoing reasons, the court concludes that plaintiff's complaint, with the anticipated amendments described herein, sufficiently alleges conduct that falls within the predicate exception to PLCAA. Defendants, then, have not shown that dismissal of the complaint under the PLCAA is appropriate.[4]

Negligence Per se

Defendants also move to dismiss plaintiff's negligence per se theory on the grounds that plaintiff has failed to allege facts sufficient to establish the violation of a statute. The court has already rejected this argument in connection with the PLCAA discussion above and does so again here. Defendants next contend that plaintiff's negligence per se theory would still fail under both Missouri and Kansas law. Under Missouri law, a plaintiff asserting negligence per se must plead that the defendant violated a specific statute or regulation and that the injury complained of was the kind the statute or regulation was designed to prevent. *See* Parr v.

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[4] In their motion to dismiss, defendants attack plaintiff's complaint in piecemeal fashion, arguing that plaintiff must show that each "claim" set forth in her complaint satisfies one of the enumerated exceptions. Plaintiff contends that if her allegations satisfy one exception, she need not separately establish, for example, that her negligent entrustment theory or her negligence per se theory also fit within one of the exceptions. Defendants do not reply to plaintiff's position. Thus, because the court finds the predicate exception applicable to this action, it declines to engage in the claim-by-claim analysis advanced by defendants. *See* Chiapperini v. Gander Mountain Co., 48 Misc. 3d 865, 13 N.Y.S.3d 777, 787 (N.Y. Sup. Ct. 2014) ("as long as one PLCAA exception applies to one claim, the entire action moves forward"); Williams v. Beemiller, Inc., 100 A.D.3d 143, 952 N.Y.S.2d 333 (N.Y. App. Div. 2012) (finding one applicable PLCAA exception and permitting entire case to go forward without addressing other exceptions as to remaining claims). This approach **[*14]** is consistent with the language of the statute itself, which does not apply to "actions" in which a knowingly violation is alleged. *See* 15 U.S.C. § 7903(5)(A) (a "qualified civil liability action" . . . "shall not include" . . . "an action" in which a seller knowingly violated state or federal statutes).

Breeden, 489 S.W.3d 774, 2016 Mo. LEXIS 188, 2016 WL 3180249, at *4 (Mo. June 7, 2016). Plaintiff has specifically pleaded that the federal Gun Control Act was intended to protect the public from violent crimes committed by felons with firearms and that Reat Underwood is a member of the class of persons meant to be protected by the Gun Control **[*15]** Act.

In summary fashion, defendants contend that plaintiff cannot state a claim under Missouri law because the Gun Control Act was not intended to prevent injuries to the public at large. Missouri courts have not considered whether a shooting victim such as Reat Underwood is within the class of persons intended to be protected by the federal Gun Control Act. In the only Missouri case cited by defendant, however, the Missouri Court of Appeals reversed a trial court's dismissal of a negligence per se claim where the plaintiff pleaded that a nursing home resident was intended to be protected by federal and state nursing home regulations and the legislative history indicated that the laws were intended to prevent physical and emotional abuse in nursing homes. *See* Dibrill v. Normandy Assocs., Inc., 383 S.W.3d 77, 84-85 (Mo. Ct. App. 2012). In the absence of any Missouri case law indicating that the Missouri Supreme Court would hold otherwise, the court is comfortable predicting that Missouri courts would conclude that the Gun Control Act was designed to protect the public by keeping "guns out of the hands of criminals and others who should not have them, and to assist law enforcement authorities in investigating serious crimes." Abramski v. United States, 134 S. Ct. 2259, 2267, 189 L. Ed. 2d 262 (2014); Huddleston v. United States, 415 U.S. 814, 824, 94 S. Ct. 1262, 39 L. Ed. 2d 782 (1974) (principal purpose of Gun Control **[*16]** Act is to "curb crime"); King v. Story's, Inc., 54 F.3d 696, 697 (11th Cir.1995) (vacating district court's award of summary judgment in favor of defendant who allegedly sold the rifle used to kill the plaintiff to a convicted felon in violation of *section 922(d)(1)*, and confirming that "[t]he trial court [properly] recognized that this plaintiff . . . is a member of the class of persons Congress intended to protect by enacting the Gun Control Act; that the injuries were of the type contemplated by the Act; and that the sale was made in violation of the Act"). Defendants, then, have not shown that dismissal of plaintiff's negligence per se theory is warranted under Missouri law.

With respect to the doctrine of negligence per se under Kansas law, defendants urge that plaintiff must establish that an individual right of action for injury arising out of the statute was intended by the legislature, as stated by the Kansas Supreme Court in Pullen v. West, 278 Kan. 183, 92 P.3d 584, 593 (Kan. 2004). Recently, however, the Kansas Supreme Court acknowledged that its rules regarding negligence per se "are difficult to reconcile and equally difficult to apply." Shirley v. Glass, 297 Kan. 888, 308 P.3d 1, 5-6 (Kan. 2013). In that case, the plaintiff filed a petition against a gun seller alleging negligence based on the seller's act of selling a firearm while knowing that the purchaser **[*17]** of the firearm intended to have another individual take possession of the firearm. Id. at 5. Both the district court and the Kansas Court of Appeals held that the plaintiff could not maintain a negligence per se claim based on a violation of the Gun Control Act because that statute did not create a private right of action. *See* Shirley v. Glass, 44 Kan. App. 2d 688, 241 P.3d 134, 149-52 (Kan. Ct. App. 2010). In a concurring opinion, Judge Malone of the Kansas Court of Appeals acknowledged that the decision was correct under the current Kansas law, but urged the Kansas Supreme Court to revisit this "additional" requirement for recovery under the theory of negligence per se. As explained by Judge Malone, Kansas courts have not always required an individual to establish that the legislature intended to create an individual right of action arising from the violation of a statute and the test currently utilized in Kansas "appears to differ from the negligence per se doctrine recognized in every other state." Id. at 158-59. In great detail, Judge Malone challenged the requirement as "difficult to apply" and one that has led to "inconsistent and curious" results. Id. at 159-60.

The plaintiff in *Shirley* sought review of the appellate court's decision on negligence per se, but the Kansas Supreme Court did **[*18]** not address the concerns raised by Judge Malone (except to the extent it agreed that much confusion exists in Kansas concerning the doctrine of negligence per se) because it determined that plaintiff was not presenting negligence per se as a separate cause of action created by statute but that she was asserting only a claim of "simple negligence" that looked to the federal statute to define the standard of care. Shirley, 308 P.3d at 5-6. The Court, then, found it "irrelevant" as to whether the federal Gun Control Act gave rise to a private cause of action because the statutory violation was not the grounds for her claim. Id. at 5. Rather, she appropriately sought to utilize the federal statutes to establish a duty of care in her negligence claim. Id. at 6.

As plaintiff highlights in her response, *Shirley* at the very least authorizes plaintiff's reliance on the federal Gun Control Act to establish the duty of care and a violation

of that statute may be used by plaintiff to establish a breach of a duty. Id. at 7. To the extent, of course, that plaintiff is attempting to plead negligence per se as a separate "statutorily created private cause of action," Kansas law would preclude that approach. Id. at 5. But to the extent that plaintiff references **[*19]** the federal statute to define the standard of care—and references a violation of that statute as evidence of breach—*Shirley* permits that approach. *See* id. at 5-6. Defendant's motion to dismiss, then, is granted under Kansas law to the extent plaintiff seeks to assert a separate claim based solely on a violation of the statute, but is denied to the extent that plaintiff is using the statute to establish duty and breach.

Negligent Entrustment

In her complaint, plaintiff asserts a claim for negligent entrustment under state law. Defendants move to dismiss this claim on the grounds that plaintiff has failed to set forth facts sufficient to plead a claim of negligent entrustment under either Kansas or Missouri law. Under the laws of both states, plaintiff, to prove this claim, must show that defendants entrusted the firearm to someone "incompetent" and that defendants had knowledge of the person's incompetence. *See* Shirley v. Glass, 297 Kan. 888, 308 P.3d 1, 6 (Kan. 2013); State ex rel. Stinson v. House, 316 S.W.3d 915, 919 & n.3 (Mo. 2010). Defendant contends that plaintiff has not sufficiently pleaded facts suggesting that Reidle was incompetent or that defendants knew that Reidle was incompetent. In her complaint, plaintiff alleges that defendants negligently entrusted the firearm to both Reidle and Miller and that Miller **[*20]** was incompetent. In her submissions, however, plaintiff clarifies that her negligent entrustment theory focuses on the entrustment of the firearm to Reidle who, according to plaintiff, was "incompetent" based solely on his status as a straw purchaser. Plaintiff further clarifies in her submissions that defendants, under the circumstances described, knew that Reidle was not the actual buyer of the firearm and, thus, knew of his status as a straw purchaser.

While defendants are correct that these allegations are not included in the complaint, the court concludes that plaintiff should be permitted to amend her complaint to include these allegations. Significantly, defendants in their reply brief focus only on the language of the negligent entrustment exception to the PLCAA and do not address plaintiff's argument that she has otherwise stated a claim for negligent entrustment under Kansas and Missouri law. The motion to dismiss, then, is denied.

IT IS THEREFORE ORDERED BY THE COURT THAT defendants' motion to dismiss for failure to state a claim (doc. 10) is granted in part and denied in part.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiff shall file an amended complaint as described herein **[*21]** no later than **Friday, July 29, 2016**.

IT IS SO ORDERED.

Dated this 18th day of July, 2016, at Kansas City, Kansas.

/s/ John W. Lungstrum

John W. Lungstrum

United States District Judge

End of Document

TAB H

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF F.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR;	§	**IN THE DISTRICT COURT**
Plaintiffs,	§	
v.	§	**BEXAR COUNTY, TEXAS**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	**224TH JUDICIAL DISTRICT**
Defendant.	§	

COMBINED FOR PRETRIAL MATTERS WITH
CAUSE NO. 2018CI14368

ROSANNE SOLIS AND JOAQUIN RAMIREZ,	§	**IN THE DISTRICT COURT**
Plaintiffs,	§	**BEXAR COUNTY, TEXAS**
v.	§	
	§	**438TH JUDICIAL DISTRICT**
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
Defendant.	§	

CAUSE NO. 2018CI23302

ROBERT BRADEN,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
v.	§	**BEXAR COUNTY, TEXAS**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	**408TH JUDICIAL DISTRICT**
Defendant.	§	

CAUSE NO. 2018CI23299

CHANCIE MCMAHAN, INDIVIDUALLY AND AS NEXT FRIEND OF R.W., A MINOR; ROY WHITE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LULA WHITE; AND SCOTT HOLCOMBE;	§	**IN THE DISTRICT COURT**
Plaintiffs,	§	
	§	
v.	§	
	§	**285TH JUDICIAL DISTRICT**
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
Defendant.	§	

BEXAR COUNTY, TEXAS

DEFENDANT ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS'S REPLY IN SUPPORT OF ITS SECOND AMENDED MOTION FOR TRADITIONAL SUMMARY JUDGMENT

Plaintiffs' Response demonstrates why Congress passed the PLCAA to protect lawful firearm sellers from "abuse[s] of the legal system." 15 U.S.C. § 7901(a)(6). Plaintiffs cite irrelevant statutes, falsely describe evidence, ignore binding case law authority, and ask this Court to eradicate the protections of the PLCAA for reasons that other courts have already rejected.

This Reply reiterates several reasons why this Court must reject the Plaintiffs' misdirection:

- Plaintiffs rely on an irrelevant statute. Academy's arguments construe the relevant statutory definition of a "firearm," 18 U.S.C. § 921(a)(3), whereas the Plaintiffs' arguments all arise from an irrelevant tax regulation, 27 C.F.R. § 53.61(b)(5)(ii).

- Plaintiffs falsely describe evidence. Plaintiffs' Response asserts that the Magpul 30-round magazine is a "component part" of the Ruger AR-556 rifle, and that Academy's witnesses admitted it. The term "component part" is irrelevant to the definition of a "firearm" in 18 U.S.C. § 921(a)(3). And Academy's witnesses did not

admit that the Magpul 30-round magazine is a "component part" of the Ruger AR-556 rifle—they did not even say the words "component part." Instead, they all testified about the statutory distinction that the rifle is a "firearm" that was lawfully sold, and the magazine is not even a "firearm" at all.

- Plaintiffs ignore binding case law authority. Plaintiffs contend that Texas courts allow negligent entrustment claims based on the sale of a firearm, but cite no cases involving the sale of goods, and ***ignore*** all of the Texas case law on the issue, which unanimously refuses to adopt the cited Restatement provision for sales of goods.

- Plaintiffs cast false doubt on the PLCAA. All other courts have also unanimously rejected Plaintiffs' desperate argument that the PLCAA does not "plainly state" an intent to foreclose this lawsuit, because Congress never meant to apply the PLCAA to cases where a seller of firearms is alleged to be negligent.

Academy is entitled to the protections of the PLCAA, and this Court must enforce those protections exactly as they are written. This Court must grant Academy's motion for summary judgment.

I. Plaintiffs Ignore The Only Statute That Matters: The Definition Of A "Firearm" In 18 U.S.C. § 921(a)(3)

The parties agree that three fundamental issues drive this Court's decision on Academy's motion for summary judgment:

1) This Court Must Dismiss If Plaintiffs Do Not Avoid The PLCAA's Grant Of Immunity. The PLCAA bars Plaintiffs' lawsuit against Academy unless their case comes within one of the PLCAA's specifically enumerated exceptions. (Response at 7-14).

2) In Search Of A PLCAA Exception, Plaintiffs Assert That Academy Violated A Statute. Plaintiffs primarily argue that their case comes within the PLCAA's "predicate exception" for a seller that "knowingly violated a State or Federal statute applicable to the sale or marketing of the product." 15 U.S.C. § 7903(5)(A). (*Id.*)

3) The Statute Cited By Plaintiffs Only Restricts The Sale Of "Firearms." The only statute cited by Plaintiffs is 18 U.S.C. § 922(b)(3), which prohibits the sale of "firearms" to a resident of another state, except that it allows the sale of a "rifle" if the "sale, delivery, and receipt fully comply with the legal conditions of sale in both such States." (*Id.*)

So far, so good. But at this point, the parties' arguments diverge widely—Academy sticks to the actual statute invoked by Plaintiffs, while Plaintiffs instead rely on inapplicable statutes, misconstrued "evidence," and wholly irrelevant concepts. Academy's motion demonstrated that 18 U.S.C. § 922(b)(3) did not prohibit the sale of a detachable 30-round magazine to Kelley, because a magazine is not a "firearm" for purposes of that statute. In contrast, the Plaintiffs build their entire argument on an irrelevant tax regulation that has nothing to do with Plaintiffs' claims or Academy's absolute immunity thereto.

A. Section 921(a)(3) Plainly Does Not Include "Magazines"

It is undisputed that Section 922(b)(3) permitted the sale of the Ruger AR-556 rifle, because the rifle is legal in both Colorado and Texas. For that reason, the Plaintiffs' argument necessarily depends on the facts that Colorado restricts the size of *magazines* sold inside the state of Colorado, and that Ruger included a detachable 30-round magazine in the packaging of the rifle sold in San Antonio, Texas.

But Academy's sale of a detachable 30-round magazine did not violate Section 922(b)(3) because it only applies to "firearms," and the relevant statutory definition of a "firearm" conspicuously excludes "magazines." 18 U.S.C. § 921(a)(3); (Motion at 21-23). A "magazine" is not a "firearm" under this definition because it fails to satisfy any of the enumerated options: (A) it does not expel projectiles by the action of an explosive, (B) it is not the "frame" or "receiver" of such a weapon, (C) it is not a "muffler" or "silencer," and (D) it is not a "destructive device."[1] *Id.*

[1] Likewise, Section 922(b)(3) gives extraterritorial effect only to those state laws regulating "firearms," and Colorado's magazine law does not regulate "firearms." The magazine law exclusively regulates "large-capacity magazines," which is the only item that is defined in the Colorado statute. See Colo. Rev. Stat. §§ 18-12-301(2)(a) (defining "large-capacity magazine") and 18-12-301(2)(b) (excluding items from the definition of "large-capacity magazine").

Because Congress drafted this definition so narrowly, the Fifth Circuit has held that a magazine "plainly" **does not come within this statutory definition** of a "firearm"—and the Plaintiffs have no response for this concise holding. *United States v. Guillen-Cruz*, 853 F.3d 768, 772-73 (5th Cir. 2017). Moreover, while Congress used broader language in other statutes such as "ammunition" and "ammunition feeding devices," it conspicuously excluded such language from Section 921(a)(3). (Motion at 23). For the purposes of the predicate exception to the PLCAA, the only definition of "firearm" that matters is the one in Section 921(a)(3), and it "plainly" **does not include magazines** like the detachable Magpul 30-round magazine that was included in the box with the Ruger AR-556 rifle that Kelley purchased. *Guillen-Cruz*, 853 F.3d at 772-73.

Plaintiffs object that Congress did not list each and every potential element of a "firearm" in this definition, such as a "trigger" or a "barrel." (Response at 14). But that argument backfires on the Plaintiffs, because that silence only proves Academy's point. This Court must presume that Congress drafted the statute purposefully to include only certain enumerated items. *Sommers for Alabama and Dunlavy, Ltd. v. Sandcastle Homes, Inc.*, 521 S.W.3d 749, 754 (Tex. 2017) ("We presume the Legislature intended precisely what it enacted and strive to give statutory language its fair meaning."). By drafting the definition of a "firearm" narrowly, not expansively, Congress intended to exclude everything that was not specifically listed—including "barrels" and "triggers." A "firearm" *only* includes the device that expels a projectile by the action of an explosive and specifically named elements of such a device, such as its "frame" or "receiver," or a "silencer." 18 U.S.C. § 921(a)(3). There are no broad terms such as "including but not limited to" or "such as" in the definition. *Id.* These limitations demonstrate Congress's intent to identify specific component parts that constitute a "firearm." Congress excluded all

other component parts and accessories from its definition of a "firearm" in Section 921(a)(3), instead of broadly including everything that might be part of, or attached to, a "firearm."

B. The Plaintiffs Cite An Irrelevant Tax Regulation

Plaintiffs have no statutory response for the "plain" fact that a "magazine" does not come within Section 921(a)(3)—the only statute that matters for Plaintiffs' statutory exception—so they change the subject. Plaintiffs repeatedly assert that 27 C.F.R. § 53.61(b)(5)(ii) includes "magazines" as a "component part" of a "firearm." (Motion at 4-5, 12-13). But that regulation governs excise taxes charged by the IRS pursuant to the Internal Revenue Code, 26 U.S.C. § 4181, and *not* any exception to the PLCAA, a fact that Plaintiffs never once disclose to the Court in their extensive briefing. Plaintiffs' favored CFR provision is irrelevant to anything in this lawsuit; it has nothing to do with 18 U.S.C. § 922(b)(3), or its associated regulation, 27 C.F.R. § 478.11, which tracks the narrow statutory definition of a "firearm."

Plaintiffs' single-minded focus on this irrelevant regulation—and wholesale failure to address the "plain" language of the actual statute at issue—proves that their statutory argument has no basis, and this Court must grant summary judgment.

C. Academy Has Not Conceded The Detachable Magpul 30-Round Magazine Is A "Component Part" Of The Ruger AR-556 Rifle

Plaintiffs also proclaim that Academy has *conceded* that a magazine is a "component part" of the AR-556 rifle. This repeated assertion sows nothing but confusion because it is both (1) legally irrelevant to the statute at issue, and (2) flatly contradicted by Plaintiffs' own evidence.

First, the Plaintiffs gain nothing by talking about "component parts" because that term is irrelevant to Section 921(a)(3). A "firearm" only includes those items that are *specifically listed* in the statute (like a "frame" or "receiver"), but does not include other component parts such as a

"firing pin," a "trigger," a "barrel," and so on. 18 U.S.C. § 921(a)(3). "Component part" is not in the statute. *Id*. Congress's omission of the term "component part" from Section 921(a)(3) is conspicuous because Congress used the term "component part" in the PLCAA, thereby extending the PLCAA's protections much farther than it extended liability under Section 922(b)(3). (*See* Motion at 25). Plaintiffs invoke the term "component part" in their Response only because their argument entirely depends on an irrelevant IRS tax regulation that uses that phrase for a different purpose.

Second, the evidence shows that Academy never conceded that the detachable Magpul 30-round magazine is a "component part" of the Ruger AR-556 rifle for purposes of Section 922(b)(3), or that the concept of a "component part" is relevant to the definition of a "firearm" in Section 921(a)(3). (Response at 4-6, 11-14). The evidence flatly contradicts each of the Plaintiffs' assertions:

- Plaintiffs claim Academy "has conceded the sale to Kelley violated § 922(b)(3) if the LCM is a 'component part' of the Ruger" and

  "Academy further admits that federal law prevents it from selling a long gun to a Colorado resident if the gun has a 'component part' that is prohibited in Colorado." (Response at 12).

  False. In the cited testimony, the Academy sales associate who sold the Ruger AR-556 rifle to Kelley testified that Academy could not sell a Ruger AR-556 rifle with an attached flash suppressor to a Colorado resident if Colorado outlawed the sale of flash suppressors, but asserted that magazines are different because they are an "accessory." (Response Ex. B at 59:1-12). The sales associate did not use the words "component part." (*Id.*) "Component part" is completely irrelevant to the definition of a "firearm" in Section 921(a)(3), and no Academy witness said that it was.

- Plaintiffs claim that "Academy's own website emphasizes that the Ruger inherently 'includes' a 30-round magazine as an integral component of the weapon." (Response at 5).

  False. In the cited testimony, Academy's director of compliance explains that the word "includes" means "includes in the box." (Response Ex. A at 198:19). He never used the words "integral component," nor did he agree with that concept. (*Id.*)

- Plaintiffs claim that "Kelley could not even legally bring the Ruger and its magazine back to Colorado," and

  "Academy admits it would have been illegal for Kelley to purchase and/or possess the Ruger he acquired from Academy in his home state of Colorado and that it would be illegal for Academy to ship the Ruger to Kelley in Colorado because the 30-round magazine included as part of the Ruger was prohibited in Colorado." (Response at 6, 11).

  False. The Ruger AR-556 rifle is legal in Colorado and Academy's witnesses consistently testified to that fact. Plaintiffs deliberately confuse the AR-556 rifle with the detachable Magpul 30-round magazine included in the same box. In the cited testimony, Academy's director of compliance testified that Kelley "cannot bring that magazine back to the state of Colorado," but reiterated that the AR-556 rifle itself was legal in Colorado. (Response Ex. A p. 69:18-20, 70:4-6). He also testified that a Colorado seller could not purchase a 30-round magazine in Colorado, and that Academy could not ship a 30-round magazine to Colorado, but these concepts are entirely irrelevant because this sale took place in San Antonio, Texas. (*Id.* at 189:17-19, 190:1-7). And at any rate, Colorado law expressly permits the out-of-state sale of 30-round magazines. (Motion at 19-20); Colo. Rev. Stat. § 18-12-302.

Plaintiffs cite testimony that proves nothing relevant to their burden of overcoming the PLCAA's grant of immunity to Academy.

D. The Plaintiffs' Other "Evidence" Also Proves Nothing

Plaintiffs also prove nothing by asserting that the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") has a document on firearms nomenclature that includes "magazines" among the various parts it names on a diagram called a "group callout." (Response at 13 & Ex. A p. 140). Plaintiffs do not even submit this document with their summary judgment evidence or provide any context for this assertion. (*Id.*) And the meager quotation gives no reason for this Court to conclude that the ATF is construing the definition of a "firearm" in 18 U.S.C. § 921(a)(3). Plaintiffs are citing an irrelevant document to support an irrelevant concept—"component part."

Plaintiffs also try to support their "component part" argument with an affidavit from a purported expert witness, Joseph Vince, Jr. (*See* Response Ex. 5). Mr. Vince asserts that "it is

my opinion that the large-capacity magazine sold with the RUGER® AR-556® sold to Devin Patrick Kelley is a component part of this semi-automatic firearm" and that the sale to Kelley violated 18 U.S.C. § 922(b)(3), because the detachable 30-round magazine "was a component part, and an integral part of the sale, of the Ruger firearm that was sold to Devin Patrick Kelley." *Id*. at ¶¶ 4(k) & (v). At the outset, this Court should grant Academy's objection to Mr. Vince's testimony, which is filed under separate cover.

Even if the Court does not strike Mr. Vince's improper opinions, Mr. Vince's affidavit does not defeat summary judgment, because it offers this Court nothing more than a legally inaccurate construction of 18 U.S.C. § 922(b)(3). The construction of Section 922(b)(3) is a question of law for this Court to decide. *See, e.g.*, *City of San Antonio v. Headwaters Coalition, Inc.*, 381 S.W.3d 543, 551 (Tex. App.—San Antonio 2012, pet. denied). And experts may not testify about questions of pure law. *Garza v. Prolithic Energy, Co., L.P.*, 195 S.W.3d 137, 146-47 (Tex. App.—San Antonio 2006, pet. denied). Mr. Vince's testimony is not valid evidence, and must be stricken.

And at any rate, Mr. Vince's testimony is utterly unpersuasive. He does not explain why his opinion about a "component part" would be relevant to this Court's analysis, except to cite the same irrelevant tax regulation that the Plaintiffs repeat in their Response. (Response Ex. 5, ¶ 4(j)). He does not acknowledge that 18 U.S.C. § 922(b)(3) says nothing about a "component part," nor does he attempt to construe the relevant definition of a "firearm" in Section 921(a)(3). (*Id*. at para. 4(v)). Mr. Vince does nothing but sign his name to the same irrelevant arguments offered by the Plaintiffs, and thus does nothing to prevent summary judgment in this case.

Plaintiffs also fail to defeat summary judgment by falsely contending that Academy's sales associate should have put "Model 8500" instead of "AR-556" as the "model number" on

ATF Form 4473. "AR-556" is the designation that Ruger engraved on the rifle pursuant to 27 C.F.R. § 478.92, and the Academy sales associate correctly transcribed that model number from the rifle onto ATF Form 4473. Ruger's designations "Model 8500" or "Model 8511" do not appear anywhere on the rifle; instead, they identify features such as other items that come in the box with the Ruger AR-556 rifle.[2] To the extent that Mr. Vince opines that Academy should have written "Model 8500" instead of "AR-556" on Form 4473, he once again improperly attempts to (1) testify on a question of pure law for this Court, and (2) incorrectly construes the law by ignoring 27 C.F.R. § 478.92.

In sum, Section 922(b)(3) employs a specific definition of "firearm" that does not include "magazines," whereas Plaintiffs' arguments relate to different statutes involving different concepts. By selling Kelley a box containing a Ruger AR-556 rifle (a "firearm") that is legal to sell, purchase, and possess in both Texas and Colorado, along with a detachable Magpul 30-round magazine, a lock, a front sight adjustment tool, and an instruction manual (none of which are "firearms"), Academy did not violate a federal statute governing the sale of "firearms" and thus did not lose the immunity afforded by the PLCAA.

II. Section 922(b)(3) Does Not Include The Entire "Transaction"

Plaintiffs also try to conceal the defects in their argument by contending that Section 922(b)(3) "requires that all of the circumstances of a long gun *transaction* comply with the law of the buyer's jurisdiction." (Response at 16). This argument is entirely irrelevant, because the operative statutory concept is not a "transaction." "Transaction" does not appear in the statute at all. *See* 18 U.S.C. § 922(b)(3). The statute prohibits the sale of a "firearm" to an out-of-state

[2] For example, the ATF Police Officer's Guide to Recovered Firearms (https://www.atf.gov/file/58626/download) shows a picture of a Glock 19 and identifies "19" as the model. Like Ruger, Glock uses various number codes to refer to the different features on a Glock 19, but for purposes of federal law the model marked on the firearm itself is the model to be identified on the Form 4473.

resident, but permits the sale of a "rifle" if the "sale, delivery, and receipt fully comply with the legal conditions of sale in both such States." (*Id.*) Nothing in the statute refers to any other goods that might be sold alongside a "firearm" or a "rifle." Plaintiffs ask this Court to add language to the statute that simply cannot be found in its text.

The cases cited by Plaintiffs do nothing to advance their cause. *United States v. Bullard* interpreted the Sentencing Guidelines phrase, "if the defendant used or possessed any firearm or ammunition in connection with another felony offense," and held that selling a gun and drugs together was using a firearm "in connection with" the offense of selling drugs. 301 F. App'x 224, 227 (4th Cir. 2008). *Bullard* did not involve Section 922(b)(3), nor the definition of a "firearm." Likewise, *Bryan v. United States* construes the word "willfully" in the criminal penalty provision of the Gun Control Act, 18 U.S.C. § 924, and rejects the petitioner's argument that courts should impute the knowledge elements of Section 922 into the criminal scienter requirement of Section 924. 524 U.S. 184, 191-96, 198-99 (1998). That scienter holding has nothing whatsoever to do with this case or the definition of a "firearm," nor does it even support the idea that a "transaction" is somehow relevant to Section 922.

Because the terms "transaction" and "component part" have no support in the statutory text or relevant case law, Plaintiffs achieve nothing by arguing that the detachable Magpul 30-round magazine was included in the same box as the Ruger AR-556 rifle, or that the rifle cannot be repeatedly fired in a semi-automatic manner without attaching a magazine (any compatible magazine, not just the one included in the box). (*See* Response at 16). Congress did not define "firearm" in a way that makes these concepts relevant. The sale of the "rifle" was legal in both Colorado and Texas, so it complied with 18 U.S.C. § 922(b)(3)'s restriction on the sale of "firearms." And the sale of the magazine was legal because it is not a "firearm" in the first

place, and Texas and Colorado alike permit Texans to sell detachable 30-round magazines to Colorado residents in Texas.

By requiring each and every element of the entire "transaction" to comply with the law of the buyer's and seller's states, instead of looking solely to the statute's definition of a prohibited "firearm" or a permissible "rifle," Plaintiffs create a new rule with absurd consequences. Imagine that a resident of a state that prohibits retailers from putting their purchases in a single-use plastic bag purchases a rifle from an Academy store in Texas. Has Academy violated 18 U.S.C. § 922(b)(3) if it puts the rifle in a plastic bag? Of course not.

Likewise, the Ruger AR-556 rifle's packaging includes a separate trigger lock and a tool for adjusting the front sight of the rifle. Are those items "firearms" because they were included in the same cardboard box as the rifle? Is the cardboard box a "firearm" too? Of course not. Though Plaintiffs protest that Academy does not allow its sales associates to remove those items from the box, that does not convert the magazine, trigger lock, adjustment tool, or cardboard box into "firearms" whose sale is regulated by 18 U.S.C. § 922(b)(3).

Section 922 does not ask whether each and every element of the "transaction" complies with the law of both states—Section 922 **does not prohibit** the sale or transfer of items that are not "firearms," whether those items are magazines or trigger locks or plastic bags.

III. Texas Courts Explicitly Reject The Plaintiffs' Theory Of Negligent Entrustment

Plaintiffs also cannot evade the PLCAA's immunity by framing their arguments as "negligent entrustment," because Texas courts have refused to extend that tort to the sale of goods. *See* Response at 28-31. Plaintiffs cite no case that has ever recognized such a claim, and give no good reason for this Court to disregard the several cases that refused to do so.

Academy's motion explained the barrier that Plaintiffs cannot overcome. While the PLCAA does not immunize firearm sellers from state law negligent entrustment claims, the PLCAA specifically states that it does not create a cause of action. 15 U.S.C. § 7903(5)(C) ("no provision of this chapter shall be construed to create a public or private cause of action or remedy"). In the absence of a valid claim for negligent entrustment pursuant to state law, Plaintiffs cannot avail themselves of the negligent entrustment exception to the PLCAA and Texas cases have expressly held that **the tort of negligent entrustment does not apply to sales**. *National Convenience Stores, Inc. v. T.T. Barge Cleaning Co.*, 883 S.W.2d 684, 686 (Tex. App.—Dallas 1994, writ denied); *Salinas v. General Motors Corp.*, 857 S.W.2d 944, 948 (Tex. App.—Houston [1st Dist.] 1993, no writ); *Rush v. Smitherman*, 294 S.W.2d 873, 875 (Tex. Civ. App.—San Antonio 1956, writ ref'd). This no-sales rule has the weight of Texas Supreme Court precedent, because the Texas Supreme Court *refused* the writ of error in the San Antonio Court of Appeals' decision in *Rush*. *National Convenience Stores*, 883 S.W.2d at 686 (explaining this principle). Plaintiffs offer nothing to overcome this well-settled authority.

Plaintiffs cite two cases involving negligent entrustment of firearms—but neither case supports their argument because *neither was against a seller of goods*. (Response at 28-29); *see Prather v. Brandt*, 981 S.W.2d 801, 806 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Kennedy v. Baird*, 682 S.W.2d 377, 378-80 (Tex. App.—El Paso 1984, no writ). As recently as last year, the Fifth Circuit surveyed Texas law and noted that "Texas has not adopted Restatement (Second) of Torts § 390 with respect to the sale of a chattel." *Allen v. Wal-Mart Stores, LLC*, 907 F.3d 170, 179 (5th Cir. 2018). Plaintiffs completely ignore this recent holding because it succinctly explains the error in their argument. *See also Jaimes v. Fiesta Mart, Inc.*,

21 S.W.3d 301, 304-05 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (another case after *Prather* and *Kennedy* that rejects Section 390's application to the sale of goods).

Finally, this Court should take note that the only evidence the Plaintiffs offer to support this invalid negligent entrustment claim is outrageous and inadmissible. Their claim entirely depends on the assertion that Academy should have known that a sale that is *perfectly legal* in Texas—the sale of a Ruger AR-556 rifle and a detachable Magpul 30-round magazine—raised a "red flag" of murderous intent because "the AR-15-style semi-automatic rifle with an LCM is a tool favored by mass shooters." (Response at 29). This Court should not be the first to second-guess the Texas Legislature's firearm laws, by declaring perfectly lawful sales to be evidence of evil intent. Kelley purchased his Ruger AR-556 rifle *more than a year and a half before the shooting*, in a purchase that complied with all federal laws and he passed the federal NICS background check, which instructed Academy to "Proceed" with the sale.

IV. Plaintiffs' Statutory Challenge To The PLCAA Has No Merit

Having failed to identify any exception to the PLCAA, the Plaintiffs urge this Court to destroy the PLCAA. They argue that the PLCAA cannot be applied to this case or any other like it, because Congress did not provide a "plain statement" of its intent to override Texas's sovereign authority. (Response at 23-27). Plaintiffs claim that Congress's intent is unclear because Plaintiffs' harm was not "solely caused" by Kelley. (*Id*. at 25-27). This Court should reject the Plaintiffs' desperate attempt to radically undermine the PLCAA, just as every other court faced with the same arguments has rejected them in the past.

A. The Supreme Court's Decisions In *Gregory* And *Bond* Are Inapplicable To The Construction Of The PLCAA Because The PLCAA Involves Express Preemption Of Qualified Civil Liability Actions That Are Otherwise Valid Pursuant To State Law

Plaintiffs do not cite any cases related to the PLCAA, or the sale of firearms, in their Response, because none of those cases, which may actually be relevant to this lawsuit, support their arguments. Instead, Plaintiffs rely on *Gregory v. Ashcroft*, in which the Supreme Court addressed the issue of whether a provision in the Missouri Constitution providing that all "judges other than municipal judges shall retire at the age of seventy years" violates the Age Discrimination in Employment Act ("ADEA") and comports with equal protection pursuant to the federal constitution. 501 U.S. 452, 455 (1991). The Court noted that a federal law making illegal Missouri's decision to require judges to retire at the age of seventy years would "upset the usual constitutional balance of federal and state powers" and therefore courts have to be "certain of Congress' intent before finding that federal law overrides this balance." 501 U.S. at 460. Nevertheless, the Court explained that as long as it is "acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Id.*

To determine whether Congress intended to alter the balance of power between the states and the federal government, the Supreme Court applies the plain statement rule, pursuant to which "Congress should make its intention clear and manifest if it intends to preempt the historic powers of the States." *Gregory*, 501 U.S. at 461 (citation and quotation marks omitted). The Supreme Court concluded that because the ADEA "plainly excludes most important state public officials, 'appointee on a policymaking level' is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not." *Id.* at 467.

Plaintiffs also rely on *Bond v. United States*, in which the Supreme Court interpreted the Chemical Weapons Convention Implementation Act ("CWCIA"). 572 U.S. 844, 134 S. Ct.

2077, 2083-85 (2014). The Court held that the CWCIA did not apply to the conduct of a woman who applied legal, commercially available chemicals to various surfaces, resulting in the intended victim suffering a "minor chemical burn on her thumb, which she treated by rinsing with water." *Id.* at 2085. The Court noted that the CWCIA was designed to implement a treaty about the use of chemical weapons in "war crimes and acts of terrorism," *id.* at 2087, and there was no clear indication that Congress intended it to apply to local criminal offenses. *Id.* at 2093 (noting that the case is unusual and the analysis appropriately limited).

Plaintiffs argue that the Supreme Court's decisions in in *Gregory* and *Bond* require the PLCAA to be interpreted as not preempting traditional state law claims, and contend that in passing the PLCAA, Congress did not "intend to deprive state courts of the authority to hold [allegedly negligent and unlawful sellers of firearms] accountable." (Response at 27). Plaintiffs ignore that almost identical arguments have been raised before by attorneys trying to avoid the immunity provided by the PLCAA, and in each case, they have been wholly rejected.

In *Delana v. CED Sales, Inc.*, the Missouri Supreme Court unanimously rejected plaintiffs' argument that the Supreme Court's decisions in *Gregory* and *Bond* require the court to "narrowly construe the PLCAA to avoid federalism issues," quickly disposing of an argument that it found to be "without merit." 486 S.W.3d 316, 322-23 (Mo. 2016). In *Delana*, the court explained that:

> *Gregory* and *Bond* involved implied preemption. In both cases, the Court held that expansive statutory definitions should be narrowly construed to avoid excessive federal intrusion into traditional issues of state concern. *Gregory* and *Bond* are not applicable to this case because the PLCAA expressly and unambiguously preempts state tort law, subject to the enumerated exceptions. This preemption is accomplished pursuant to Congress's constitutional power to regulate interstate commerce. Because Congress has expressly and unambiguously exercised its constitutionally delegated authority to preempt state law negligence actions against sellers of firearms, there is no need to employ a narrow construction to avoid federalism issues.

486 S.W.3d at 323 (internal citations omitted).

Other courts have held that the doctrine of constitutional avoidance is inapplicable to construction of the PLCAA because its intent to bar qualified civil liability actions is clearly expressed and because there are no serious doubts about its constitutionality. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1143 (9th Cir. 2009) (holding that the doctrine of constitutional avoidance is not applicable to interpreting the PLCAA because "congressional intent is clear from the text and purpose of the statute" and there are no grave doubts over its constitutionality); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 388 (Alaska 2013); (*compare* Response at 31-32).

Because the very purpose of Congress in enacting the PLCAA was to expressly preempt qualified civil liability actions, such as the present, the Supreme Court's decisions in *Gregory* and *Bond* are simply inapplicable to construing the clear terms of the PLCAA in an attempt to avoid its specifically intended application.

B. The PLCAA Bars All Qualified Civil Liability Actions Regardless Of Whether Plaintiffs Claim That The Alleged Negligence Of A Seller Of Firearms Is Also A Cause Of Their Damages

One of Congress' stated purposes in enacting the PLCAA was to "prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms . . . for the harm solely caused by the criminal or unlawful misuse of firearm[s] . . . by others when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1) (emphasis added). Plaintiffs argue that the PLCAA's reference to harm that is "solely caused by the criminal or unlawful misuse of firearm[s]" means that the PLCAA does not apply to cases, such as this one, in which plaintiffs contend that their harm was also caused by the alleged negligence or unlawful conduct of sellers of firearms. (Response at 25-27). There is no support for this argument in the PLCAA.

If Plaintiffs' argument were to be accepted, it would mean that Congress passed the PLCAA for no reason, as it would not prohibit any causes of action. If Plaintiffs argued that the harm of which they complain was solely caused by the criminal or unlawful misuse of a firearm, they would not name as defendants and seek damages from the manufacturers and sellers of that firearm. Instead, Congress specifically explained that it was passing the PLCAA because of a wide variety of findings implicating numerous concerns:

- Lawsuits have been commenced against manufacturers, distributors, dealers and importers of firearms that operate as designed and intended which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

- Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

- The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

15 U.S.C. §§ 7901(a)(3), (5), (7).

Regardless of whether Plaintiffs agree, Congress found that when someone is shot or killed with a firearm in circumstances related to the criminal or unlawful misuse of that firearm by a third party, that the harm is "solely caused" by the criminal or unlawful misuse of the firearm, and that the seller of the firearm should not be held liable. In fact, Congress specifically determined that holding sellers liable for the harm caused by firearms under such circumstances,

even if they could otherwise be held liable under applicable state tort law, would threaten separation of powers and principles of federalism. *Id.* § 7901(a)(8).

The operative provision of the PLCAA therefore simply prohibits the filing of a "qualified civil liability action," which is defined as any action "resulting from the criminal or unlawful misuse" of a firearm by a third party, with certain enumerated exceptions. 15 U.S.C. § 7903(5)(A). A "qualified civil liability action" does not incorporate the concept of "sole causation" or a seller's sole liability. Language regarding the purpose for which a statute is enacted cannot be used to limit the clear terms used in the operative provisions of that statute. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 245 (1989) (rejecting argument that the expansive coverage of the operative provisions of RICO should be narrowly read to apply only to organized crime based on statements regarding the purpose of the Act). *See also* 2A Sutherland, Statutes and Statutory Construction § 47.04, at 146 (5th ed. 1992, Norman Singer ed.) ("The preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.").

For this reason, courts have repeatedly rejected Plaintiffs' argument that the reference by Congress to "solely caused" in the purposes section of the PLCAA can be used to narrow the operative language of the PLCAA. *Delana*, 486 S.W.3d at 322 (holding that the "statement of purpose does not overcome the fact that the specific substantive provisions of the PLCAA expressly preempt all qualified civil liability actions against firearms sellers, including claims of negligence).[3] *See also Gustafson v. Springfield, Inc.*, No. 1126 of 2018, at 6-7 (Penn. Ct. Common Pleas Jan. 15, 2019) (copy attached as Exhibit A); *Estate of Kim*, 295 P.3d at 387

[3] Plaintiffs apparently made the exact same arguments against application of the PLCAA in the *Delana* case as they do in this case. *Compare* Response at 26 (arguing that the word "solely" was of particular importance to Congress and should not be treated as superfluous), *with Delana*, 486 S.W.2d at 322 (unanimously rejecting such argument).

(unanimously rejecting plaintiffs' argument on the basis that it would "elevate the preamble over the substantive portion of the statute, giving effect to one word in the preamble at the expense of making the enumerated exceptions meaningless"); *Phillips v. Lucky Gunner, LLC*, 84 F.Supp.3d 1216, 1223-24 (D. Colo. 2015); *Gilland v. Sportsmen's Outpost, Inc.*, No. X04CV095032765S, 2011 WL 2479693, at *15-*16 (Conn. Super. Ct. May 26, 2011).

C. Plaintiffs Waived Any Constitutional Argument By Failing To Brief It

Finally, Plaintiffs assert that the PLCAA might "potentially" violate the due process and equal protection components of the Fifth Amendment, or "potentially" violate the Tenth Amendment, and that "additional concerns also arise under the Guarantee Clause"—but then state that while they "reserve their right" to make these challenges in the future, they "are not making that challenge at this point to avoid undue delay." (Response at 31-32). Rule 166a commands the non-movant to present all arguments against summary judgment or else waive the omitted arguments forever. *See* Tex. R. Civ. P. 166a(c); *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 862 (Tex. 2000) ("On an appeal from summary judgment, we cannot consider issues that the movant did not present to the trial court."). Because the Plaintiffs chose not to brief their meritless constitutional arguments, they waived their right to rely on those arguments in opposition to summary judgment.

Accordingly, Plaintiffs' claims against Academy constitute a "qualified civil liability action" that is expressly barred by the PLCAA unless they can satisfy the requirements of the predicate exception. And the arguments above demonstrate that Plaintiffs cannot satisfy those requirements.

CONCLUSION & PRAYER

Accordingly, Academy requests that the Court issue a final summary judgment that Plaintiffs take nothing on their claims against Academy, and dismiss this lawsuit as the PLCAA requires.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel ***via hand delivery, facsimile, electronic notification, and/or certified mail return receipt requested*** on January 30, 2019.

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Exhibit A

MR 420

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

MARK and LEAH GUSTAFSON, Individually and as Administrators and Personal Representatives of the ESTATE OF JAMES ROBERT ("J.R.") GUSTAFSON,	)	
Plaintiffs,	)	
v.	)	No. 1126 of 2018
SPRINGFIELD, INC. d/b/a SPRINGFIELD ARMORY, and	)	
SALOOM DEPARTMENT STORE; and SALOOM DEPT. STORE, LLC, d/b/a SALOOM DEPARTMENT STORE,	)	
Defendants.	)	

OPINION AND ORDER OF COURT

AND NOW, to wit, this 15th day of January, 2019, with the attorneys of record for all parties having been present for argument on Defendants' *Preliminary Objections to the Complaint, Brief in Support* and *Reply Brief*; along with Plaintiffs' *Complaint*, *Answer* and *Memorandum of Law in Support of Plaintiff's Answer;* as well as the United States' *Memorandum in Support of the Constitutionality of the Protection of Lawful Commerce in Arms Act*; and upon careful consideration of all of the foregoing by this Court, it is hereby ORDERED, ADJUDGED and DECREED, as follows:

Defendants' preliminary objection in the nature of a demurrer pursuant to Pa.R.C.P. 1028(a)(4), requesting dismissal of the Plaintiffs' Complaint with prejudice pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 ("PLCAA") is SUSTAINED, for the reasons elaborated upon below.

The matter presently at issue is the legal sufficiency of Plaintiffs' complaint. Defendants claim that Plaintiffs' present complaint fails to state a valid cause of action as all claims fall squarely within the category of state civil lawsuits prohibited by federal law under the PLCAA, and that the complaint must therefore be dismissed. Plaintiffs state that all claims raised in the complaint are supported by Pennsylvania products liability law and that none of the claims raised are barred by the PLCAA. Plaintiffs also claim that the PLCAA must be interpreted according to principles of constitutional avoidance. In the alternative, Plaintiffs argue that the PLCAA is unconstitutional. The United States has intervened in a limited capacity in this matter to argue for the applicability and constitutionality of the PLCAA, and it is joined by Defendants in this argument.

Looking to the facts of the case, on March 20, 2016, Plaintiffs' decedent, then thirteen-year-old James Robert ("J.R.") Gustafson, was killed by a model XD-9 semi-automatic handgun ("subject handgun") manufactured by Defendant Springfield, Inc. ("Springfield") and sold by Defendant Saloom Department Store ("Saloom"). J.R. was visiting the home of a friend with another fourteen-year-old friend (the "Juvenile Delinquent") when the Juvenile Delinquent found the unsecured subject handgun in the home. The Juvenile Delinquent believed that the subject handgun was unloaded because the magazine had been removed, however a live round remained in the chamber. The Juvenile Delinquent pointed the subject handgun at J.R. and pulled the trigger. The subject handgun fired and J.R. was killed. The Juvenile Delinquent subsequently pled guilty to involuntary manslaughter in a delinquency proceeding in juvenile court.

A complaint comprised of survival and wrongful death claims was filed by Plaintiffs on March 19, 2018. The complaint asserts negligent design and sale as well as negligent warnings and marketing with regard to manufacture and sale of the subject handgun. The present preliminary objections asserting that the complaint fails to state a valid cause of action were filed by the

Defendants on June 29, 2018. On October 19, 2018, the United States of America petitioned to intervene in the case, as the constitutionality of a federal law has been implicated. The intervention petition was granted, and all parties participated in oral argument in this matter on October 31, 2018.

CONSTITUTIONAL AVOIDANCE

As a preliminary matter, Plaintiffs argue that the principle of constitutional avoidance is implicated in this case. Defendants and the United States argue that the doctrine of constitutional avoidance does not apply in this case, as the PLCAA is an appropriate exercise of federal authority which presents no constitutional issues. The doctrine of constitutional avoidance is utilized in situations "where an otherwise acceptable construction of a statute would raise serious constitutional problems." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). In such situations, "the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.*

Plaintiffs claim that state sovereignty is being infringed upon by the federal government in a way that renders a narrow reading of the PLCAA necessary. Plaintiffs first point to the United States Supreme Court case of *Gregory v. Ashcroft,* which sets out the "plain statements rule" under which "it is incumbent upon the [] courts to be certain of Congress' intent before finding that federal law overrides 'the traditional constitutional balance of federal and state power.'" 501 U.S. 452, 464 (1991). The Supreme Court noted that "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States…" *Id.* at 461 (1991). Plaintiffs also cite to the Pennsylvania Superior Court case of *Romah v. Hygenic Sanitation Co.* for the related principle that "[a]bsent express preemption, courts are not to infer preemption lightly, particularly in areas traditionally of core concern to the states such as tort law." 705 A.2d 841, 849 (Pa. Super. Ct. 1997). Plaintiffs additionally reference the case of *Bond v. United States* which extended the

principles set out in *Gregory*. *Bond v. United States*, 572 U.S. 844 (2014). The holding in *Bond* allowed for a reading of ambiguity into otherwise unambiguous language in the absence of a direct statement of Congressional intent, where a plain reading would "alter sensitive federal-state relationships." *Id.* at 863.

This exact issue with regard to the PLCAA has been addressed by the Supreme Court of Missouri in the 2016 *Delana v. CED Sales, Inc.* case. 486 S.W.3d 316, 322-23 (Mo. 2016). The *Delana* Court addressed the issue of *Gregory* and *Bond's* application to the PLCAA, noting the above referenced standards for the application of the constitutional avoidance doctrine. *Id.* at 322. The Missouri Supreme Court found that Congress "expressly and unambiguously exercised its constitutionally delegated authority to preempt state law negligence actions against sellers of firearms," rendering a narrow reading of the statue unnecessary. *Id.* at 3233.

Although not binding upon this Court, the reasoning of the Missouri Supreme Court is persuasive, and this Court similarly finds no need to narrowly construe the PLCAA in this case where the intention to preempt Pennsylvania tort law is "clear and manifest" in the terms of the statute. The present analysis does not even reach the *Gregory* and *Bond* constitutional avoidance doctrine, because the text of the statute makes manifest Congress' intent to preempt state tort law. Congress explicitly stated in the PLCAA that it intended to "prohibit causes of action" as defined in the PLCAA to "prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce." 15 U.S.C. § 7901. Throughout the PLCAA, Congress unambiguously and without question states its intention to definitively preempt state tort law. Additionally, as described below, the Court finds no constitutional issues which require avoidance, as Congress has appropriately utilized its authority in enacting the PLCAA. As such, the doctrine of constitutional avoidance is not implicated in the case at bar.

APPLICABILITY OF PLCAA TO THE PRESENT CASE

It is undisputed that Plaintiffs set out adequate *prima facie* claims under Pennsylvania products liability law which would survive preliminary objections. The Court must thus assess the applicability of the PLCAA to Plaintiff's claims. The PLCAA states that "[a] qualified civil liability action [under the PLCCA] may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). A qualified civil liability action is generally defined by the PLCAA as "a civil action… brought by any person against a manufacturer or seller of a qualified product… for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party…" subject to certain enumerated exceptions. 15 U.S.C. § 7903(5)(A). The exception at issue in this case reads as follows:

> [A]n action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.

15 U.S.C. § 7903(5)(A)(v). It is undisputed that Springfield is a "manufacturer" and Saloom is a "seller" as defined under 15 U.S.C. § 7903. It is also clear that the subject handgun is a "qualified product" under the statute.

Plaintiffs argue that the PLCAA is inapplicable because the present case is not a civil action "resulting from the criminal or unlawful misuse of a qualified product by the person or a third party…" 15 U.S.C. § 7903(5)(A). Plaintiffs argue that the phrase "resulting from" in the definition of qualified civil liability action is not explicitly defined in the PLCAA, and so the meaning must be found in the PLCAA's Purposes and Findings section. 15 U.S.C. § 7901. Plaintiffs point to the language which states a congressional finding that "[t]he possibility of imposing liability on an entire industry for the harm that is solely caused by others is an abuse of the legal system" is

problematic, and that one of the purposes of the PLCAA is "[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products…" 15 U.S.C. § 7901(a)(6); 15 U.S.C. § 7901(b)(1). Plaintiffs argue that the use of the phrase "solely caused" implies that a qualified civil liability action cannot be one in which gun manufacturer negligence was a cause of harm in addition to third party unlawful misuse. Plaintiffs additionally point out that an earlier version of the PLCAA did not use the word "solely" in its purposes and findings section. Plaintiffs note the proposition that statutes should be treated, where possible, to avoid construing any part as superfluous. *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 112 (1991).

Defendants argue that the United States Supreme Court has made clear that it is inappropriate to narrowly read the broad language of a statute to be entirely consistent with the stated purposes and legislative history of the statute when this reading would contradict the actual statutory text. *H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229, 243-45 (1989). Defendants also point out that Plaintiff's argument regarding the "solely caused" language has been rejected by various other courts throughout the country, including the Supreme Courts of Missouri and Alaska, and the United States District Court for the District of Colorado. *See e.g.*, *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 322 (Mo. 2016); *Estate of Kim ex rel. Alexander v. Coxe,* 295 P.3d 380, 387 (Alaska 2013); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1223-24 (D. Colo. 2015).

The Court finds the logic set forth by the Defendants and elaborated upon by other Courts persuasive. Here, the plain language of the statute bars civil liability actions "resulting from" criminal or unlawful use of a qualified product. Although it is true that "resulting from" is not defined in the statutory definition section of the PLCAA, the phrase on its face has a plain meaning

that does not require further definition. To emphasize the addition of one word in the Purposes and Findings section over the actual substantive text of the statute would run contrary to the United States Supreme Court's directive in *H.J. Inc.* 492 U.S. at 243-45. The Court additionally finds convincing the argument of Supreme Court of Alaska: that to allow a general negligence claim to persist would render the negligence *per se* and negligent entrustment provision of the PLCAA a surplusage. 15 U.S.C. § 7903(5)(A)(ii); *Estate of Kim,* 295 P.3d at 386. This reading of the statute would render an entire operative section of the statute superfluous, which is entirely undesirable under United States Supreme Court precedent. *Astoria,* 501 U.S. at 112. As such, this Court declines to adopt Plaintiff's reading of the statute wherein the present action does not fall under the prohibition on qualified civil liability actions based on their reading of "solely caused" and "resulting from."

Plaintiffs next argue that the present case falls under the products liability exception as there was no occurrence of a "volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). Plaintiffs first argue a lack of a criminal offense on the part of the Juvenile Delinquent, as "[d]elinquency proceedings are not criminal in nature…" *In Interest of G.T.*, 597 A.2d 638, 641 (Pa. Super. 1991). Defendants point out that a "delinquent act" is defined under Pennsylvania law specifically as "an act designated a crime under the law of this Commonwealth…" 42 Pa. C.S.A. § 6302 (West). Defendants additionally reference the case Supreme Court of Illinois case of *Adames v. Sheahan* as being the only case presently adjudicated which has addressed the issue of applying the PLCAA "criminal offense" provision to a minor. 909 N.E.2d 742 (Ill. 2009).

The *Adames* case concerned a minor who shot and killed another minor using a handgun belonging to his father. *Id.* at. 761. The minor was adjudicated delinquent through the Illinois juvenile delinquency process, with the court in the juvenile proceeding finding that the minor

committed involuntary manslaughter. *Id.* The Illinois Supreme Court, when confronted with the applicability of the "criminal misuse" provision of the PLCAA, looked to the definition of "criminal" found in Black's Law Dictionary, which reads: "[h]aving the character of a crime; in the nature of a crime." *Id.* The Illinois Supreme Court found that, although the minor was not charged or adjudicated criminally, he certainly violated the Illinois Criminal Code based on his juvenile adjudication. *Id.* The act of shooting and killing another "was 'in the nature of a crime,'" and thus fell squarely within the categorization of criminal misuse under the PLCAA. *Id.* Here, the Court finds the *Adames* reasoning persuasive. Although Plaintiffs correctly point out that juvenile proceedings are not criminal in nature, delinquent acts in Pennsylvania are by definition "act[s] designated a crime under the law of" the Commonwealth of Pennsylvania. 42 Pa. C.S.A. § 6302. Additionally, the focus of the PLCAA is on the "volitional act" and the criminal character thereof. As explained by the *Adames* Court, committing an act amounting to involuntary manslaughter, whether prosecuted criminally or not, still amounts to a committing a criminal act and is thus applicable under the "criminal misuse" portion of the PLCAA. The Court thus declines to adopt Plaintiffs' reading "volitional act that constituted a criminal offense."

Based upon the foregoing rationale, the Court finds that the present action is a "qualified civil liability action" under the PLCAA. The Court will next address Plaintiffs' constitutionality concerns.

CONSTITUTIONALITY OF PLCAA

Plaintiffs argue that if the PLCAA is found to apply to the case at bar, the PLCAA is unconstitutional. Defendants and the United States argue that the PLCAA is a valid exercise of Congress' power under the United States Constitution.

PRINCIPLES OF FEDERALISM AND THE TENTH AMENDMENT

Plaintiffs first argue that the PLCAA is violative of principles of federalism and the Tenth Amendment to the United States Constitution because it bars certain common law claims without barring equivalent statutory claims, intruding upon states' inherent powers. Defendants and the United States argue that the PLCAA does not violate these principles because it is a valid exercise of one of Congress' enumerated powers, and it does not force action by state actors.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. The issue of the PLCAA's interaction with the Tenth Amendment and principles of federalism has been addressed in the Second Circuit case of *City of New York v. Beretta U.S.A. Corp.* 524 F.3d 384, 396-97 (2d Cir. 2008). In its reasoning, the Second Circuit explains that where Congress is acting within the scope of its enumerated powers, "the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states…" *Id.* at 396. If a properly enacted federal law does not "commandeer the states' executive officials or legislative processes" then it is not violative of the Tenth Amendment under Supreme Court precedent. *Id.*

This Court agrees with the analysis of the Second Circuit in *Beretta*. As explained below, the PLCAA is a valid exercise of Congress' authority under the Commerce and Supremacy Clauses of the United States Constitution. As the PLCAA is properly enacted, we must consider whether the law commandeers state powers. Here, the operative provision provides that statutorily defined "qualified civil liability action[s] may not be brought in any Federal or State court," and that the statute applies retroactively to any applicable cases pending at the time of the enactment of the statute, requiring their dismissal. 15 U.S.C. § 7902(a). No portion of the PLCAA involves

commandeering the powers of state executive officials or legislative processes in any manner. The PLCAA merely allows certain statutory and judicial remedies while disallowing others.

The United States additionally argues that the PLCAA does not shift the balance of power between the state legislatures and courts as dramatically as indicated by the Plaintiffs. The United States correctly notes that some traditional common law causes of action are preserved under the PLCAA, while certain statutory claims are preempted. The PLCAA, therefore, does not impermissibly dictate the balance of power between the states' judicial and legislative branches, but merely disallows certain civil actions, whether created through common law or through statute. For the foregoing reasons, this Court finds the PLCAA constitutional with regard to the Tenth Amendment and principles of federalism.

DUE PROCESS RIGHTS

Plaintiffs next argue that the PLCAA violates the Plaintiffs' substantive due process rights by depriving them of a cause of action without providing them with a substitute remedy. Defendants and the United States argue that the Plaintiffs have not been deprived of due process because they do not have a valid and vested property interest at stake. They additionally argue that even if such a property interest existed, that Plaintiffs are not deprived of all remedies at law.

The Fifth Amendment to the United States Constitution reads in relevant part:"[n]o person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Plaintiffs note the longstanding legal principle that "[w]here there is a legal right, there is also a legal remedy by suit or action at law." *Marbury v. Madison,* 5 U.S. 137, 163 (1869) (citation omitted). The United States Supreme Court has held, however, that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law." *Silver v. Silver,* 280 U.S. 117, 122 (1929) (citation omitted).

"The procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit': 'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" *Town of Castle Rock, Colo. v. Gonzales,* 545 U.S. 748, 756, (2005). The *Duke Power* case instructs that when dealing with liability limiting legislation, "[o]ur cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.'" *Duke Power Co v. Carolina Envtl. Study Group,* 438 U.S. 59, 88 n.32 (U.S. 1978). (citations omitted). In fact, the Third Circuit case of *In re TMI* explains that "[u]nder the United States Constitution, legislation affecting a pending tort claim is not subject to 'heightened scrutiny' due process review because a pending tort claim does not constitute a vested right." *In re TMI,* 89 F.3d 1106, 1113 (3d Cir. 1996).

Here, this Court finds the case of *In re TMI* instructive. If a pending tort claim does not constitute a vested property right, then it only stands to reason that a potential tort claim, not yet realized or filed at the time of the enactment of legislation would certainly not constitute a vested property right. This logic is reinforced by the United States Supreme Courts' notations in *Duke Power* that reinforces that no property interest exists in any common law rule, and that liability limiting statutes are not unusual and are routinely enforced by the Courts. 438 U.S. at 88 n.32. As such, this Court finds that Plaintiffs do not have a constitutionally protected property right in their tort claim in this matter, and so a due process analysis is inapplicable.

Assuming *arguendo* that a vested property right does exist, Plaintiffs argue that the PLCAA deprives them of due process without providing an alternate remedy. The United States points again to the *Duke Power* case for the proposition that "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy" in a case which involved

imposition of a monetary liability limitation on causes of action resulting from accidents at federally licensed nuclear power plants. 438 U.S. at 88. In further support, the United States points to the later case of *Martinez v. California,* in which the United States Supreme Court upheld a state liability-limiting statute, which provided immunity to officials responsible for decisions regarding paroling inmates, without any available equivalent remedy at law. 444 U.S. 277, 282 (1980).

Defendants additionally argue that Plaintiffs are not entirely without redress, as they may sue the individual who committed the criminal misuse of the firearm, and they additionally may sue any manufacturer, distributor or seller as long as the claim falls appropriately within one of the PLCAA's exceptions. This issue of procedural due process as applied to the PLCAA has been addressed by the Ninth Circuit Court in the case of *Ileto v. Glock, Inc.* 565 F.3d 1126, 1141-42 (9th Cir. 2009). The Ninth Circuit found that "the PLCAA does not completely abolish Plaintiffs' ability to seek redress. The PLCAA preempts certain categories of claims that meet specified requirements, but it also carves out several significant exceptions to that general rule." *Id.* at 1143. The Court here finds the Ninth Circuit's reasoning persuasive, and that even if a vested property right did exist in this case, the PLCAA does not deprive Plaintiffs of due process, and is thus constitutional.

EQUAL PROTECTION

Plaintiffs additionally argue that the PLCAA is violative of the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. Plaintiffs claim that the PLCAA discriminates against certain gun violence victims without a rational basis, with Congress favoring gun violence victims in states utilizing legislative remedies over victims in states utilizing judicial remedies. Defendants and the United States argue that the rational basis standard is easily satisfied in this matter.

In assessing an equal protection claim, the appropriate standard must be utilized, and all parties in this matter agree that rational basis review is the appropriate standard here. Under rational basis review, a statutorily imposed difference in treatment of two groups "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). It is also important to note that rational basis review is an extraordinarily deferential standard, and "a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* (citation omitted).

The PLCAA's Findings and Purposes section sets out an ample rational basis for any differential treatment found here. 15 U.S.C. § 7901. Congress cites to its important interests in protecting the Second Amendment rights of American citizens to keep and bear arms, as well as the avoidance of an unreasonable burden on interstate and foreign commerce. 15 U.S.C. § 7901(a)(2); 15 U.S.C. § 7901(a)(6). Congress then expresses its belief that judicial remedies might be used to circumvent the democratic legislative processes, and so gives preference to legislatively enacted remedies over judicially created remedies, subject to certain exceptions. 15 U.S.C. § 7901(a)(7); 15 U.S.C. § 7901(a)(8). This rationale easily passes rational basis review. Even if this Court were to disagree with Congress' logic, "rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Heller* at 319. As such, PLCAA cannot be found unconstitutional based on an equal protection analysis.

COMMERCE CLAUSE AND CONGRESSIONAL AUTHORITY

Plaintiffs finally argue that the PLCAA is not a legitimate exercise of Congressional Commerce Clause authority. Plaintiffs claim that this is because the PLCAA does not actually regulate the conduct of the gun industry, but instead limits liability. Plaintiffs additionally point out

that the PLCAA does not even go as far as to limit liability, so long as a statutory remedy is enacted. The United States argues that the PLCAA is a valid exercise of Congressional authority under both the Commerce Clause and the Supremacy Clause of the U.S. Constitution.

The Commerce Clause provides Congress with the authority "[t]o regulate commerce with foreign nations, and among the several states…" U.S. Const. art. I § 8, cl. 3. The Supremacy Clause declares that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

In the PLCAA's Findings and Purposes, Congress specifically noted that the availability of certain qualified civil liability actions in both state and federal courts could have a potentially chilling effect on interstate commerce. 15 U.S.C. § 7901(a)(6). The Supreme Court of the United States has repeatedly reaffirmed that "one State's power to impose burdens on the interstate market… is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) (citation omitted).

In the *Ileto* case, the Ninth Circuit addressed the applicability of the Commerce Clause to the PLCAA, stating "[w]e have no trouble concluding that Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits, interstate and foreign commerce of firearms would be affected." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1140–41 (9th Cir. 2009). This Court agrees with the assessment of the Ninth Circuit, in that it is entirely reasonable that the PLCAA would have a direct and immediate effect on the regulation of interstate and foreign commerce. It is not unreasonable for Congress to find that limiting liability in certain situations

would directly affect and bolster interstate trade in firearms, and the Commerce Clause, together with the Supremacy Clause, allows Congress the specifically enumerated authority to do so.

Plaintiffs argue that the United States Supreme Court case of *Murphy v. National Collegiate Athletic Association* renders the PLCAA unconstitutional, as the act restricts liability instead of directly regulating the gun industry. 38 S. Ct. 1461 (2018). This Court can find nothing in *Murphy*, however, that overcomes the binding cases set out by the United States which indicate a longstanding position that regulating and limiting liability is a form of economic regulation permissible under the Commerce Cluase. See, e.g., *Riegel v. Medtronic*, 552 U.S. 312, 323-25 (2008); *Kurns v. A.W. Chesterton,* 620 F.3d 392, 398 (3d Cir. 2010). This reasoning is bolstered by the United States Supreme Court's admonition that "[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (citation omitted). As such, as the Supreme Court did not explicitly disallow the restriction of liability as a method of utilizing Congress' Commerce Clause powers, *Murphy* is inapplicable here.

Defendants point to additional Congressional authority for the PLCAA pursuant to Congress' right "to enforce constitutional rights against the States and to use 'preventative rules… [as] appropriate remedial measures,' where there is 'a congruence between the means used and the ends to be achieved.'" *City of Boerne v. Flores,* 521 U.S. 507, 530 (1997). In the case of the PLCAA, Congress explicitly set out to enforce the constitutional right to keep and bear arms under the Second Amendment. 15 U.S.C. § 7901(a)(1). Defendants point out the obvious link between the right to keep and bear arms and the obvious need for manufacturers and sellers to be able to produce and sell the same in interstate commerce. As such, this Court finds that Congress' exercise of its commerce power works directly in concert here with its power to enforce protected Second

Amendment rights, bolstering the argument that Congress has acted in an entirely valid and appropriate manner pursuant to its enumerated powers in enacting the PLCAA.

Based upon the foregoing analysis, the Court finds that the PLCAA applies to Plaintiffs claims as set out in their complaint in this matter. The Court further finds that the doctrine of constitutional avoidance is not implicated in this case, rendering a narrow reading which would allow Plaintiffs claims to proceed inappropriate. The Court additionally finds that the PLCAA is in no way in violation of the United States Constitution.

Accordingly, Defendants' Preliminary Objection is SUSTAINED. Plaintiffs' Complaint is DISMISSED with prejudice in its entirety pursuant to 15 U.S.C. § 7901 et seq. and Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.

In accord with Pa.R.C.P. 236(a)(2)(b), the Prothonotary is DIRECTED to note in the docket that the individuals listed below have been given notice of this Order.

BY THE COURT:

Harry F. Smail, Jr., Judge

ATTEST:

Prothonotary

cc: Gary F. Lynch, Esq., for Plaintiffs
Jonathan E. Lowy, Esq. for Plaintiffs
John K. Greiner, Esq. for Defendants
Christopher Renzulli, Esq. for Defendants
Eric J. Soskin, Esq. for United State of America

TAB I

CAUSE NO. 2017-CI-23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF F.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR;	§	**IN THE DISTRICT COURT**
***Plaintiffs*,**	§	
v.	§	**BEXAR COUNTY, TEXAS**
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
Defendant.	§	**224TH JUDICIAL DISTRICT**

COMBINED FOR PRETRIAL MATTERS WITH

CAUSE NO. 2018-CI-14368

ROSANNE SOLIS AND JOAQUIN RAMIREZ,	§	**IN THE DISTRICT COURT**
***Plaintiffs*,**	§	
v.	§	**BEXAR COUNTY, TEXAS**
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
Defendant.	§	**438TH JUDICIAL DISTRICT**

CAUSE NO. 2018-CI-23302

ROBERT BRADEN,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
	§	
	§	
v.	§	
	§	**BEXAR COUNTY, TEXAS**
	§	
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
	§	
Defendant.	§	**408TH JUDICIAL DISTRICT**

CAUSE NO. 2018-CI-23299

CHANCIE MCMAHAN, INDIVIDUALLY AND AS NEXT FRIEND OF R.W., A MINOR; ROY WHITE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LULA WHITE; AND SCOTT HOLCOMBE;	§	**IN THE DISTRICT COURT**
Plaintiffs,	§	
	§	
v.	§	**BEXAR COUNTY, TEXAS**
	§	
	§	
	§	
	§	
	§	
	§	
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
	§	
Defendant.	§	**285TH JUDICIAL DISTRICT**

Order on Summary Judgment

Defendant Academy, Ltd. d/b/a Academy Sports + Outdoors's Second Amended Motion for Traditional Summary Judgment is denied.

MR 568

Signed and entered February 4, 2019.

Hon. Karen H. Pozza

MR 569

TAB J

CAUSE NO. 2017CI23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED, AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF F.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR,	§	**IN THE DISTRICT COURT**
***Plaintiffs*,**	§	
	§	
v.	§	**BEXAR COUNTY, TEXAS**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
***Defendant*.**	§	**224TH JUDICIAL DISTRICT**

COMBINED FOR PRETRIAL MATTERS WITH
CAUSE NO. 2018CI14368

ROSANNE SOLIS AND JOAQUIN RAMIREZ,	§	**IN THE DISTRICT COURT**
***Plaintiffs*,**	§	
	§	
v.	§	**BEXAR COUNTY, TEXAS**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
***Defendant*.**	§	**438TH JUDICIAL DISTRICT**

CAUSE NO. 2018CI23302

ROBERT BRADEN,	§	**IN THE DISTRICT COURT**
***Plaintiff*,**	§	
	§	
v.	§	**BEXAR COUNTY, TEXAS**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
***Defendant*.**	§	**408TH JUDICIAL DISTRICT**

CAUSE NO. 2018CI23299

CHANCIE MCMAHAN, INDIVIDUALLY AND AS NEXT FRIEND OF R.W., A MINOR; ROY WHITE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LULA WHITE; AND SCOTT HOLCOMBE,	§	**IN THE DISTRICT COURT**
***Plaintiffs*,**	§	
	§	
v.	§	**BEXAR COUNTY, TEXAS**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
***Defendant*.**	§	**285TH JUDICIAL DISTRICT**

DEFENDANT ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS'S MOTION TO PERMIT INTERLOCUTORY APPEAL OF THE COURT'S SUMMARY JUDGMENT ORDER AND MOTION TO AMEND THE SUMMARY JUDGMENT ORDER

Defendant Academy, Ltd. d/b/a Academy Sports + Outdoors (Academy) moves for permission to file an interlocutory appeal from this Court's denial of its Second Amended Motion for Traditional Summary Judgment. Academy's right to immunity under the Protection of Lawful Commerce in Arms Act (PLCAA) presents pure questions of law. These legal issues should be reviewed immediately to honor the PLCAA's mandate that federally licensed sellers of firearms, such as Academy, must not be subjected to the delay and expense of trial in a qualified civil liability action. To do otherwise would negate the PLCAA's fundamental purpose. Judicial efficiency will be well served by a quick resolution of the controlling legal questions by the courts of appeals. Such resolution could potentially save this Court and the parties significant resources litigating claims that, pursuant to federal law, should not have even been filed and must not be allowed to proceed.

INTRODUCTION

The Legislature created an avenue to settle novel or disputed controlling questions of law to provide guidance to the Court and the parties in cases like this one. The need to obtain appellate resolution of these legal issues at the outset is especially important where the legislative branch (the U.S. Congress) has made clear policy directives and their application has not been settled in Texas. Proceeding without that guidance could end up wasting substantial pre-trial and trial time and resources of the Court and all the parties, witnesses, and venirepersons. The Texas Supreme Court recognized that necessity drove the Legislature to enact the permissive interlocutory appeal statute to serve public policy. *Sabre Travel International, Ltd. v. Deutsche Lufthansa AG*, ___ S.W.3d ___, 2019 WL 406062, *8 (Tex. 2019). Section 51.014(d)'s permissive interlocutory appeal procedure helps ensure the quick resolution of certain civil suits, making the judicial system more efficient, less costly, and more accessible to taxpayers. *Id*. at *8.

Section 51.014(d) authorizes this Court to grant a permissive interlocutory appeal of controlling questions of law that can, and should, be resolved immediately by the appellate courts because they will materially advance the ultimate termination of the litigation. TEX. CIV. PRAC. & REM. CODE § 51.014(d); TEX. R. CIV. P. 168. This case presents precisely those types of controlling questions of law. By this motion, Academy seeks: 1) permission to appeal the controlling questions of law; and 2) an amended order denying Academy's motion for summary judgment that complies with § 51.014(d) and Rule 168, which is a requirement for a permissive appeal.

To comply with Rule 168, the amended order that will be the subject of the permissive appeal must identify the controlling questions of law as to which there is a substantial ground for

difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation. Academy's proposed order is attached hereto.[1]

MOTION FOR PERMISSIVE APPEAL

I. Academy's Motion And Plaintiffs' Response Present Pure Questions Of Law As To Which There Is A Substantial Difference Of Opinion.

A. *The summary judgment motion and response raise pure legal questions.*

Academy's motion for summary judgment and Plaintiffs' response presented this Court with questions of statutory construction, which are pure questions of law. *See First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008). The ultimate issue is whether Academy is entitled to immunity under the PLCAA, which, in turn, depends on the proper construction of several statutory provisions. Plaintiffs assert that the PLCAA does not provide Academy with complete immunity from their lawsuits because they allege: 1) they satisfied the exceptions in 15 U.S.C. §§ 7903(5)(A)(ii) and (iii) for claims for "negligence per se" or arising from the violation of "a State or Federal statute applicable to the sale or marketing of" a "qualified product"[2]; 2) they satisfied the exception in § 7903(5)(A)(ii) for negligent entrustment; and 3) the PLCAA only applies to cases in which a plaintiff's injuries were "solely caused" by the criminal or unlawful misuse of a firearm by others and not also by the alleged negligence or other wrongful conduct of a seller that does not fall within one of the exceptions.

All of these claimed bases for denial of the motion for summary judgment raise pure questions of law. Under the first argument, the federal statute Plaintiffs claim Academy violated

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[1] By proposing this form of order, Academy does not waive but reserves the right to challenge the rulings therein.

[2] The predicate exception requires that Plaintiffs prove a knowing violation of a State or Federal statute applicable to the sale of a "qualified product" and that the violation was a proximate cause of the Plaintiffs' harm. Academy did not move for summary judgment on the issues of a knowing violation or proximate cause and reserves its rights to challenge these issues.

is 18 U.S.C. § 922(b)(3), which makes it unlawful for a licensed dealer to sell a "firearm" to an out-of-state resident, but specifically allows the sale of a "rifle" or "shotgun" to an out-of-state resident if the sale is in person and fully complies with the legal conditions of sale in both the state of the seller's business and the state of the buyer's residence. Plaintiffs do not, and cannot, challenge the legality of the sale of the rifle itself. Rather, Plaintiffs argue that because a detachable 30-round magazine made by Magpul was included in the retail package containing the Ruger model AR-556 rifle sold to Devin Kelley (who represented himself as a Colorado resident and presented a Colorado driver's license with a Colorado Springs, Colorado address), and because the sale of the detachable 30-round magazine would have been unlawful if made in Colorado, the sale failed to comply with the legal conditions of sale in Colorado and therefore violated 18 U.S.C. § 922(b)(3).

But § 922(b)(3) speaks only to "firearms," which are defined in 18 U.S.C. § 921(a)(3). Plaintiffs can only defeat summary judgment if they are correct that the statutory term "firearm" as used in 18 U.S.C. §§ 921(a)(3) and 922(b)(3) includes a magazine. Plaintiffs alternatively argue that because the 30-round magazine was sold in the same retail package as the rifle, the magazine was an indivisible part of the sales transaction, requiring compliance with Colorado law with respect to the magazine. These are pure legal questions that turn on the proper interpretation of the terms in the statute.

Plaintiffs' negligence per se claim necessarily depends on the violation of a statute, so it fails as a matter of law if Academy's legal construction of the PLCAA and 18 U.S.C. § 922(b)(3) is correct—also pure questions of law. *See Reeder v. Daniel*, 61 S.W.3d 359, 361-62 (Tex. 2001) (negligence per se is a common-law doctrine that allows courts to rely on a penal statute to define a reasonably prudent person's standard of care). And Plaintiffs' negligent entrustment claim fails

as a matter of law unless Texas law allows such a claim to apply to the sale of goods—a pure question of law. *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 613 (Tex. 1996) (tort liability requires existence of a duty, which is a question of law); *Rice v. Rice*, 533 S.W.3d 58, 60 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

Finally, Plaintiffs' argument that the PLCAA applies only to cases in which a plaintiff's injury was "solely caused" by the criminal or unlawful misuse of a firearm by others, and not also by the alleged negligence or other alleged wrongful conduct of a seller that does not fall within one of the exceptions, requires interpretation of the PLCAA itself. The phrase "solely caused" appears in the findings and purpose section of the PLCAA but not in the operative language of the statute, which requires harm suffered by the Plaintiffs that is "resulting from" the criminal or unlawful misuse of a firearm by others. *See* 15 U.S.C. § 7903(5)(A)(iii). This also involves pure questions of statutory construction, which are questions of law for the courts.

The motion for summary judgment and response raise no genuine issues of material fact. Instead, this case requires the application of law to undisputed facts. In their response to Academy's motion for summary judgment, Plaintiffs argued that "at minimum, there is a genuine issue of material fact as to whether Academy's violation of the law proximately caused Plaintiffs' harm." (Resp. at 22). But this assumes a "violation of the law," which is a pure question of law as discussed above. A fact issue regarding causation could *only* arise if there was a violation of the law in the first instance—a pure legal question.

B. ***These questions of law are "controlling."***

These questions of law are "controlling" because they govern the outcome of this lawsuit. If the court of appeals agrees with Academy, then Congress has declared through the PLCAA that these lawsuits "may not be brought" and the entire litigation must be dismissed. 15 U.S.C. § 7902(a). If the court of appeals agrees with Plaintiffs, then their case will proceed.

Courts have noted that "there has been little development in the case law" regarding the meaning of terms like "controlling" in the Texas permissive appeal statute. *Gulf Coast Asphalt Co. v. Lloyd*, 457 S.W.3d 539, 544 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Nevertheless, courts have found guidance in a law review article in which Judge Renee Yanta examined the identical federal standard in 28 U.S.C. § 1292(b). *Id.* (quoting Renee Forinash McElheney [now Yanta], *Toward Permissive Appeal in Texas*, 29 St. Mary's L.J. 729, 747–49 (1998)).

> A controlling question of law is one that deeply affects the ongoing process of litigation. If resolution of the question will considerably shorten the time, effort, and expense of fully litigating the case, the question is controlling. Generally, if the viability of a claim rests upon the court's determination of a question of law, the question is controlling.

Id. (quoting the law review article).

The legal arguments made by the parties plainly satisfy this definition. Whether the PLCAA grants immunity to Academy based on the undisputed facts of this case presents "controlling" questions of law because resolution of these legal issues in Academy's favor would require the Court to dismiss this litigation altogether, thus shortening the time, effort, and expense of litigation and serving the purpose of the PLCAA. *See* 15 U.S.C. § 7901(a)(6) (the purpose of the PLCAA is to avoid lawsuits like this one that are an "abuse of the legal system"). For the same reason, the viability of the Plaintiffs' entire case turns on these questions of law. *See Gulf Coast Asphalt*, 457 S.W.3d at 544. Academy's the PLCAA arguments present the model case of controlling questions of law that can, and should, be resolved by an immediate interlocutory appeal.

In sum, the controlling questions of law are:

1. Whether the term "firearm," as used in 18 U.S.C. §§ 921(a)(3) and 922(b)(3), includes a detachable magazine that is sold in the same retail package as the firearm;

2. Whether a detachable 30-round magazine packaged by the manufacturer with a rifle is an indivisible part of the sale of the rifle under 18 U.S.C. § 922(b)(3) and,

therefore, requires a seller in another state to comply with Colorado law, with respect to the magazine, when the rifle is sold to a Colorado resident outside of Colorado.

3. Whether Texas law recognizes a claim for negligent entrustment in the sale of goods, e.g., a firearm or rifle.

4. Whether the PLCAA's immunity only protects a seller from being sued in a "qualified civil liability action" under 15 U.S.C. § 7903(5) if a plaintiff's injury was "solely caused" by the criminal or unlawful misuse of a firearm by others, and not also by the alleged negligence or other alleged wrongful conduct of a seller that does not fall within one of the exceptions.

C. *There is a substantial ground for difference of opinion on these controlling questions of law.*

As is evident from the significant summary judgment briefing of the parties, there is a substantial ground for difference of opinion on these controlling questions of law. TEX. CIV. PRAC. & REM. CODE § 51.014(d)(1). Although this Court denied Academy's motion for summary judgment, both parties provided the Court with authority that they contended supported their conflicting legal arguments about the proper interpretation of the PLCAA, 18 U.S.C. § 922(b)(3), and Texas law regarding negligent entrustment.

Courts have explained that "substantial grounds for disagreement exist when the question presented to the court is novel or difficult, when controlling circuit law is doubtful, when controlling circuit law is in disagreement with other courts of appeals, and when there simply is little authority upon which the district court can rely." *Gulf Coast Asphalt*, 457 S.W.3d at 544 (quoting the law review article). The Court's order denying Academy's motion for summary judgment pursuant to the PLCAA demonstrates "substantial ground for difference of opinion." The Plaintiffs presented novel and difficult questions of law and the parties cite conflicting authorities for this Court. In addition, there is no Texas caselaw interpreting or applying the PLCAA.

II. An Immediate Appeal Will Materially Advance The Ultimate Termination Of The Litigation.

The second requirement for a permissive appeal is that immediate appellate review of the controlling questions of law will materially advance the ultimate termination of the litigation. TEX. CIV. PRAC. & REM. CODE § 51.014(d)(2). That is the case here. There are no material issues of fact—only pure legal issues—and the immediate resolution of these legal issues in Academy's favor will materially advance the ultimate termination of this litigation.

Courts have explained that an interlocutory appeal satisfies this requirement when the appeal would "considerably shorten[] the time, effort, and expense involved in obtaining a final judgment." *Oklahoma Specialty Ins. Co. v. St. Martin De Porres, Inc.*, No. 05–17–00194–CV, 2017 WL 1737997, at *1 (Tex. App.—Dallas May 4, 2017, no pet.); *see also, e.g.*, Wright & Miller, 16 FED. PRAC. & PROC. JURIS. § 3930 (3d ed.) (discussing identical federal standard). For example, where the controlling question of law was an affirmative defense that would defeat the plaintiff's entire case, an immediate appeal could "materially advance the ultimate termination of the litigation." *Asplundh Tree Expert Co. v. Goertz*, No. 03–16–00760–CV, 2016 WL 7046853, at *1 (Tex. App.—Austin Dec. 1, 2016, no pet.) (accepting a permissive appeal to determine whether limitations barred a class action lawsuit).

Immediate appeal of this Court's PLCAA ruling would "materially advance the ultimate termination of the litigation" for the same reason that these legal questions are "controlling." TEX. CIV. PRAC. & REM. CODE § 51.014(d)(2). Lawsuits like this one "may not be brought in any Federal or State court" unless they come within one of the PLCAA's narrow, enumerated exceptions. 15 U.S.C. § 7902(a). If the appellate courts agree with Academy's arguments, the Plaintiffs' entire lawsuit must be dismissed. *Id*. There is no surer way to "materially advance the ultimate termination of the litigation." *See, e.g.*, *Asplundh*, 2016 WL 7046853, at *1.

MOTION TO AMEND SUMMARY JUDGMENT ORDER

In permitting an interlocutory appeal, a trial court must include that permission in the order to be appealed, which in this case is the Court's order denying Academy's motion for summary judgment. TEX. R. CIV. P. 168. The order must also identify the controlling questions of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation. Rule 168 expressly allows a previously issued order to be amended to comply with these requirements. Accordingly, Academy requests that this Court amend its previous order denying its motion for summary judgment and sign the attached proposed order. In presenting this proposed order, Academy approves only the form of the order, which is designed to allow the Court to specify the specific ground(s) on which it denied the motion for summary judgment. Academy reserves the right to challenge the substantive rulings contained therein.

PRAYER

Wherefore, Academy requests that this Court grant this motion, amend its previous order denying Academy's Second Amended Motion for Traditional Summary Judgment in a manner that complies with Rule 168, and allow a permissive interlocutory appeal of the amended order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served on counsel of record by using the Court's CM/ECF system on the 8th day of March 2019, addressed as follows:

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TAB K

CAUSE NO. 2017CI23341

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Plaintiffs	§	
	§	**224TH JUDICIAL DISTRICT**
VS	§	
	§	**BEXAR COUNTY, TEXAS**
ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS	§	
Defendant	§	

COMBINED FOR PRETRIAL MATTERS WITH
CAUSE NO. 2018CI14368

ROSANNE SOLIS AND JOAQUIN RAMIREZ	§	**IN THE DISTRICT COURT**
Plaintiffs	§	
	§	**438th JUDICIAL DISTRICT**
VS	§	
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS	§	
Defendant	§	**BEXAR COUNTY, TEXAS**

MR 634

CAUSE NO. 2018CI23302

ROBERT BRADEN	§	**IN THE DISTRICT COURT**
Plaintiff	§	
	§	
VS	§	**408th JUDICIAL DISTRICT**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS	§	
	§	
Defendant	§	
	§	**BEXAR COUNTY, TEXAS**

CAUSE NO. 2018CI23299

CHANCIE MCMAHAN, INDIVIDUALLY AND AS NEXT FRIEND OF R.W., A MINOR; ROY WHITE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LULA WHITE; and SCOTT HOLCOMBE	§	**IN THE DISTRICT COURT**
	§	
Plaintiffs	§	
	§	
VS	§	**258TH JUDICIAL DISTRICT**
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS & OUTDOORS	§	
	§	
Defendant	§	
	§	**BEXAR COUNTY, TEXAS**

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS'S MOTION TO PERMIT INTERLOCUTORY APPEAL OF THE COURT'S SUMMARY JUDGMENT ORDER AND MOTION TO AMEND THE SUMMARY JUDGMENT ORDER

NOW COMES Chris Ward, individually and as Representatives of the Estates of Joann Ward, Deceased, and B.W., Deceased Minor, and as next friend of R.W., an Minor; Robert Lookingbill, individually and as next friend of R.G., a minor, and as Representative of the Estate

of R.G., Deceased minor, Rosanne Solis, Joaquin Ramirez, Chancie McMahan, individually and as next friend of R.W., a minor, Roy White, individually and as Representative of the Estate of Lula White, and Intervenors Scott Holcombe, and Robert Braden, (referred interchangeably as "Plaintiffs") and file this Response in Opposition to Defendant Academy, Ltd. d/b/a Academy Sports + Outdoors's Motion to Permit Interlocutory Appeal of the Court's Summary Judgment Order and Motion to Amend the Summary Judgment Order, and in support of the same, would respectfully show the Court as follows:

INTRODUCTION

On February 4, 2019, this Court denied Defendant Academy, Ltd. d/b/a Academy Sports + Outdoors's Second Amended Motion for Summary Judgment. *See* Order attached hereto as Exhibit 1. Since its entry, no request has been made asking the Court to enter any findings concerning any legal and factual questions. Nor has any motion for reconsideration been filed.

Over one month later—on March 8, 2019, Defendant Academy, Ltd. d/b/a Academy Sports + Outdoors ("Defendant") filed its Motion to Permit Interlocutory Appeal of the Court's Summary Judgment ("Defendant's Motion"). *See* Def.'s Motion for Permissive Appeal. By way of its Motion, Defendant argues that its Second Amended Motion for Summary Judgment and Plaintiffs' response thereto "present pure questions of law as to which there is a substantial difference of opinion." *See* Def's Motion for Permissive Appeal at 4. Defendant further argues that those alleged questions of law are "controlling" and that "there is a substantial ground for difference of opinion on these controlling questions of law." *Id*. at 7—9.

But a simple review of Defendant's Second Amended Motion for Summary Judgment, Plaintiffs' Response to that Motion, and Texas Civil Practice & Remedies Code §51.014(d) establishes that Defendant's Motion should be denied. Permissive appeal of this Court's Order Denying Defendant's Second Amended Motion for Summary Judgment should be denied.

PERMISSIVE APPEALS ARE GOVERNED BY STATUTE

Interlocutory appeals are governed by Texas Civil Practice and Remedies Code § 51.014, which provides, in relevant part:

> (a) A person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that:
>
> * * *
>
> (d) On a party's motion or on its own initiative, a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable if:
>
> (1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and
>
> (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation.
>
> * * *
>
> (e) An appeal under Subsection (d) does not stay proceedings in the trial court unless:
>
> (1) the parties agree to a stay; or
>
> (2) the trial or appellate court orders a stay of the proceedings pending appeal.
>
> (f) An appellate court may accept an appeal permitted by Subsection (d) ***if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed***, files in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.

Tex. Civ. Prac. & Rem. Code §51.014 (emphasis added). Defendant seeks a permissive appeal pursuant to Section 51.014(d). *See* Def's Motion.

ARGUMENT AND AUTHORITIES

I. Defendant's Motion Should Be Denied as It Was Untimely Filed.

More than thirty days has passed since this Court denied Defendant's Second Amended Motion for Summary Judgment. Seeking at what can only be described as a second bite at the proverbial apple, Defendant now asks this Court, by way of its Motion to Amend the Summary Judgment Order, to make affirmative findings in the absence of any basis to do so. Likewise, and due in part to Defendant's failure to obtain findings of fact and conclusions of law following this Court's denial of Defendant's Second Amended Motion for Summary Judgment, Defendant asks this Court to enter an Amended Order. In doing so, Defendant asks this Court to make affirmative findings, when none were requested during or immediately following the summary judgment proceedings and when Defendant's requested findings are simply unsupported by the procedural history of this case.

Over one month after this Court entered its Order denying Defendant's Second Amended Motion for Summary Judgment—weeks after the fifteen day deadline to file any notice before the San Antonio intermediate court of appeals—Defendant filed the instant motions. *See* Tex. Civ. Prac. & Rem. Code §51.014(f). Recognizing its failures to obtain an Order that could properly be the subject of a permissive appeal, Defendant filed a Motion for Entry of an Amended Order, complying with Tex. R. Civ. P. 168, asking, for the first time, for this Court to make a number of findings. Defendant's proposed Amended Order boldly asks this Court to affirmatively find that the denial of Defendant's Second Amended Motion for Summary Judgment raises "pure questions of law" and that "there are no genuine issues of material fact."[1] *See* Proposed Order at p. 3.

[1]As discussed *infra*, Defendant's request for entry of the Amended Proposed Order should be denied. As argued in Plaintiffs' Response to Defendant's Second Amended Motion for Summary Judgment, Defendant's summary judgment raised numerous fact questions which alone, warranted the denial of summary judgment.

While Texas Rule of Civil Procedure provides parties like Defendant the method of obtaining permission to appeal permissively, Defendant failed to timely and reasonably do so. Rule 168 provides:

> On a party's motion or on its own initiative, a trial court may permit an appeal from an interlocutory order that is not otherwise appealable, as provided by statute. Permission must be stated in the order to be appealed. An order previously issued may be amended to include such permission. The permission must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation.

Tex. R. Civ. P. 168. Admittedly, Rule 168 provides no specific deadline for a movant seeking a permissive appeal to obtain an amended Order granting permission by the Trial Court. But when read in concert with Tex. Civ. Prac. & Rem. Code § 51.014(f), it is clear that the deadline to appeal **any** Order from the Trial Court on a permissive basis is fifteen days. *Compare* Tex. Civ. Prac. & Rem. Code §51.014 (f) *with* Tex. R. Civ. P. 168. Likewise, the comments to Rule 168 make clear that it was "added to implement amendments to section 51.014(f)-(f) of the Texas Civil Practice & Remedies Code." *See* Tex. R. Civ. P. 168 cmt.—2011. That Rule 168 provides the mechanism for obtaining an amended order granting permission to appeal on a permissive basis does not modify the specific timing requirements of Section 51.014(f).

Following the February 5, 2019 entry of this Court's Order denying Defendant's Second Amended Motion for Summary Judgment, Defendant took no steps to timely obtain permission from this Court to permissively appeal the Order. It was not until well over a month later that Defendant filed the instant motion. But Defendant's unreasonable and unnecessary delay deprives it of the right to appeal this Court's order on a permissive basis. If Rule 168 was indeed enacted to "implement" Section 51.014(f), as the comments state, Defendant's deadline to obtain an order granting permission to appeal on a permissive basis, amended or otherwise, and file an application

with the San Antonio Court of Appeals was **February 19, 2019**. Any contrary interpretation not only contravenes the purpose of an accelerated, interlocutory appeal, but it also rewards a moving party for delay. It would afford parties such as Defendant herein a greater length of time to evaluate its options to appeal on an interlocutory, permissive basis than those specifically afforded a right to interlocutory appeal by statute, such as parties seeking an interlocutory appeal from an order appointing a receiver, an order granting or denying a temporary injunction, an order granting or denying a special appearance, or even a governmental entity seeking to appeal the denial of a plea to the jurisdiction. *See* Tex. Civ. Prac. & Rem. Code §51.014 (a)(1-13).

Defendant failed to timely obtain an Order from this Court granting it permission to appeal the denial of its Second Amended Motion for Summary Judgment. Defendant should not be allowed to manipulate Rule 168 to extend the deadline clearly and unambiguously provided for in Section 51.014(f). Defendant's Motion should be denied.

II. Defendant's Motion Should Be Denied as it has Failed to Establish its Right to a Permissive Appeal of this Court's Denial of its Second Amended Motion for Summary Judgment.

Section 51.014 of the Texas Civil Practices and Remedies Code and Rule 168 of the Texas Rules of Civil Procedure provide a very "[n]arrow exception to the general rule that only final judgments and orders are appealable," and Courts "must strictly construe those jurisdictional requirements." *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001); *see Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007); *see also King–A Corp. v. Wehling*, No. 13–13–00100–CV, 2013 WL 1092209, at *3 (Tex. App.–Corpus Christi Mar.14, 2013, no pet.) (mem. op.) (per curiam). To appeal this Court's Order denying its Second Amended Motion for Summary Judgment, Defendant must not only timely obtain an Order from this Court granting such permission, but Defendant must "establish that the order 'involves a controlling question of law as to which there is a substantial ground for difference of opinion' and allowing immediate

appeal 'may advance the ultimate termination of the litigation.'" *Fisher-Reed v. Altair Subdivision Prop. Owners' Ass'n, Inc.*, No. 04-17-00818-CV, 2018 WL 280414, at *1 (Tex. App.—San Antonio, Jan. 3, 2018, no pet.) (citing Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d) (West Supp. 2017); Tex. R. App. P. 28.3)). Defendant has failed to do so. Defendant's Motion should be denied.

A. Defendant Has Failed to Establish the Absence of Genuine Issues of Material Fact.

Fact issues are not within the scope of a permissive appeal. *See Diamond Prods. Int'l, Inc. v. Handsel*, 142 S.W.3d 491, 494 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("The statute does not contemplate permissive appeals of summary judgments where the facts are in dispute. Instead, permissive appeals should be reserved for determination of controlling legal issues necessary to the resolution of the case."); *see also Undavia v. Avant Med. Grp., P.*A., 468 S.W.3d 629, 634 (Tex. App.–Houston [14th Dist.] 2015, no pet.). "The statute does not contemplate permissive appeals of summary judgments where the facts are in dispute. Instead, permissive appeals should be reserved for determination of controlling legal issues necessary to the resolution of the case. While the issue in the summary judgment is central to appellee's claim, its resolution does not rest on a controlling legal issue or materially advance the termination of the litigation." *Handsel*, 142 S.W.3d at 494 (referring to Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d)).

Defendant brazenly asserts that "there are no genuine issues of material fact." *See* Amended Proposed Order at 3. But a review of the motion and response shows otherwise. By way of Defendant's Second Amended Motion for Summary Judgment, Defendant argued: (1) the PLCAA bars lawsuits such as this because; (2) none of the exceptions to the PLCAA apply; (3) there was no viable claim for negligent entrustment on these facts ; (4) defendant did not violate the federal statute governing the sale of firearms to out-of-state residents (18 U.S.C. § 922(b)(3)) and thus PLCAA's "predicate exception" did not apply. In response, Plaintiffs demonstrated that

(1) fact issues exist as to whether this case falls within the PLCAA's general definition of a prohibited "qualified civil liability action";[2] (2) fact issues exist as to the applicability of the predicate exception to the PLCAA (3) fact issues exist as to whether the prohibited LCM was a "component part" of the Ruger, (4) genuine issues of material fact exist as to whether Defendant's violation of §922(b)(3) proximately caused Plaintiffs' harm; and (5) fact issues exist as to Plaintiffs' negligent entrustment claim. Despite the numerous genuine issues of material fact raised in Plaintiffs' Response, Defendant asks this Court to amend its February 4, 2019 ruling to identify several alleged questions of law. Plaintiffs respond individually to Defendant's requested findings.

Defendant first asks this Court to identify the following, as a "controlling question of law" raised by Defendant's Second Amended Motion for Summary Judgment:

> Whether the term "firearm" as used in 18 U.S.C. §921(a)(3) and 922(b)(3), includes a detachable magazine that is sold in the same retail package as the firearm.

See Proposed Amended Order at 3. But this is not a controlling issue of law. As argued in Plaintiffs' Response, and at the extensive oral argument before the trial court, Plaintiffs did raise fact issues regarding whether this suit constitutes a "qualified civil action" and whether the prohibited LCM was a "component part" of the Ruger. *See* Pltfs' Response at pp. 7-17.

Defendant's second proposed "controlling issue of law" is riddled with fact issues. Defendant asks this Court to identify the following, as a "controlling question of law" raised by Defendant's Second Amended Motion for Summary Judgment:

[2] While Defendant presumed the applicability of the PLCAA, Plaintiffs argued that genuine issues of material fact exist as to whether the statute even applied.

> Whether the detachable 30-round magazine packaged by the manufacturer with a rifle is an indivisible part of the sale of the rifle under 18 U.S.C. §922(b)(3) and, therefore, requires a seller in another state to comply with Colorado law, with respect to the magazine, when the rifle is sold to a Colorado resident outside of Colorado.

See Proposed Amended Order at 3. This issue was never directly raised in Defendant's Second Amended Motion for Summary Judgment. Rather, Plaintiffs introduced this issue through the argument that "even if an LCM were not a 'component part' of a 'firearm' Academy violated §922(b)(3) because the LCM was an indivisible part of the 'sale' of a 'firearm.'" Pltf's Response at 15-17. This argument, like that related to whether these claims even constitute a "qualified civil liability action" under the PLCAA, did not require this Court to establish the fact as a matter of law. In fact, Plaintiff did not file a cross-motion for summary judgment seeking any declarations or judgment as a matter of law. In support of this argument, Plaintiffs relied upon numerous exhibits and deposition excerpts. These deposition excerpts and exhibits raised genuine issues of material fact concerning whether the pre-packaged LCM was an integral and inseparable part of the sale of the Ruger. This Court made no finding and neither party has sought a finding that this fact was conclusively established as a matter of law.

Next, Defendant asks this Court to find that the issue of whether "Texas law recognizes a cause of action for negligent entrustment in the sale of goods, e.g., a firearm or rifle" constitutes a controlling issue of law. *See* Proposed Amended Order at 3. But, like Academy's first proposed question, this is not a *controlling* question of law. Plaintiffs' argument about the validity of a Texas negligent entrustment claim was *made in the alternative* and assumed that the predicate exception had been found not to apply. *See* Pltfs' Response at p. 28-30. ("even if some claims were barred as 'qualified civil liability actions,' Plaintiffs' negligent entrustment claims must survive.") Because the predicate exception clearly applies and because "PLCAA provides no basis

to dismiss any claim— including negligence claims—where the 'predicate' exception is satisfied," Plaintiffs' suit would and does prevail even if the specific negligent entrustment claim were to fail. *See* Pltfs. at p. 9. Thus, resolution of Academy's proposed "controlling question of law" would not resolve the case in any meaningful way. Plaintiffs raised genuine issues as to whether such a claim exists under Texas law under these facts. Neither Plaintiffs nor Defendant asked this Court to hold, unequivocally, that a negligent entrustment claim exists as a matter of law. Plaintiffs merely raised genuine issues of material fact in support of this claim.

Finally, Defendant asks this Court to identify the following, as a "controlling question of law" raised by Defendant's Second Amended Motion for Summary Judgment:

> Whether the PLCAA's immunity only protects a seller from being sued in a "qualified civil liability action" under 15 U.S.C. §7903(5)(A) if a plaintiff's injury was "solely caused" by the criminal or unlawful misuse of a firearm by others, and not also by the alleged negligence or other wrongful conduct of a seller that does not fall within one of the exceptions.

See Proposed Amended Order at 3. First, this issue was never directly raised by Defendant's Second Amended Motion for Summary Judgment.. However, like two of Academy's other proposed question, it is not a *controlling* question of law because it does not support dismissal if the predicate exception clearly applies, as it does. Indeed, Pltf.'s response makes clear that this was an alternative argument that did not even need to be addressed because of the clear applicability of the predicate exception. *See id.* at 9. Further, the issue of whether Academy was one cause of the Plaintiffs' injury is a factual question.

As discussed *supra*, fact issues are not within the scope of a permissive appeal. *Handsel*, 142 S.W.3d at 494; *Avant Med. Grp., P.A.*, 468 S.W.3d at 634. Because Section 51.014 does not contemplate permissive appeals of summary judgments where the facts are in dispute, Defendant's Motion should be denied.

B. Defendant Has Failed To Establish That This Court's Ruling On Its Second Amended Motion For Summary Judgment Involved Controlling Questions of Law.

"Section 51.014(d) is not intended to relieve the trial court of its role in deciding substantive issues of law properly presented to it." *Gulley v. State Farm Lloyds*, 350 S.W.3d 204, 208 (Tex. App.—San Antonio 2011, no pet.). "The legislature's institution of the procedure authorizing a trial court to certify an immediate appeal of an interlocutory order was premised on the trial court having first made a substantive ruling on the controlling legal issue being appealed." *In re Estate of Fisher*, 421 S.W.3d 682, 684–85 (Tex. App.—Texarkana 2014, no pet.). Moreover, while a "summary judgment at issue may be important" it does not necessarily dispose of controlling issues in the case. *See Handsel*, 142 S.W.3d at 495–96; *see also In Re Estate of Fisher*, 421 S.W.3d 682, 684–5 (Tex. App.–Texarkana 2014, no pet.) (explaining that a grant of partial summary judgment does not necessarily decide a controlling question of law*)*; *King–A Corp. v. Wehling*, No. 13–13–00100–CV, 2013 WL 1092209, at *3 (Tex. App.–Corpus Christi March 14, 2003, no pet.) ("[W]e disapprove of the notion that this standard [substantial ground for difference of opinion] is met by default whenever a trial court rules against a petitioner for permissive review."). But Defendant herein seeks just that—a permissive appeal merely because this Court ruled against it.

While there has been little development of the case law interpreting Tex. Civ. Prac. & Rem. Code §51.014, several courts have written on the issue of "controlling questions of law." A controlling question of law (1) is one that deeply affects the ongoing process of litigation, (2) the resolution of which will considerably shorten the time, effort, and expense of fully litigating the case, and (3) the viability of the claim depends on the court's determination of the question of law. *Gulf Coast Asphalt Co., L.L.C. v. Lloyd*, 457 S.W.3d 539, 544-45 (Tex. App.–Houston [14th Dist.] 2015, no pet.). Aside from completing setting aside this Court's denial of Defendant's Second

Amended Motion for Summary Judgment if its permissive appeal is successful, Defendant has failed to show that any of the four requested controlling issues of law are in fact controlling issues of law.

In its Motion, Defendant argues that "whether the PLCAA grants immunity to Academy based on the undisputed facts of this case presents 'controlling' questions of law because resolution of these legal issues in Academy's favor would require the Court to dismiss the litigation altogether, thus shortening the time, effort, and expense of litigation and serving the purpose of the PLCAA." *See* Def.'s Motion at 7. Yet, a review of caselaw in Texas reveals that no Texas Court has granted a permissive appeal in a PLCAA case. Moreover, Defendant believes it is entitled to immunity in this suit is undisputed; but the applicability of the PLCAA, whether an exception to the statute applies, whether Plaintiffs' claims for negligence, negligence per se, and negligent entrustment survive—all remain in dispute.

In short, Defendant has failed to its burden under §51.014 and Tex. R. Civ. P. 168. Specifically, Defendant failed to establish how the issue of "whether the term "firearm" as used in 18 U.S.C. §§ 921(a)(3) and 922(b)(3), includes a detachable magazine that is sold in the same retail package as the firearm" is one that deeply affects the ongoing process of litigation. Nor has Defendant established how the resolution of this issue will considerably shorten the time, effort, and expense of fully litigating the case. Finally, Defendant wholly failed to establish how the viability of Plaintiffs' claim depends on the Court's determination of that issue.

Likewise, Defendant has failed to establish how the issue of "whether the detachable 30-round magazine packaged by the manufacturer with a rifle is an indivisible part of the sale of the rifle under 18 U.S.C. §922(b)(3) and, therefore, requires a seller in another state to comply with Colorado law, with respect to the magazine, when the rifle is sold to a Colorado resident outside

of Colorado" is one that deeply affects the ongoing process of litigation. For one, Defendant misstates the issue: Plaintiffs only argued that Academy is obligated to comply with federal law, which explicitly incorporates the law of an out-of-state-buyer's state; that is not complying with Colorado law. *See* Pltf.'s Resp. at 17-19. Defendant also ignores that a key argument by Plaintiffs was that federal law requires that the whole firearms *transaction,* including those that include magazines as firearms. *See id.* at 15-17. That was a basis to deny Defendant's motion independent of this issue. Further, as discussed supra, it is not an issue raised in Defendant's Second Amended Motion for Summary Judgment and wholly ignores the dispute concerning whether the PLCAA even applies in this matter. Nor has Defendant established how the resolution of this issue will considerably shorten the time, effort, and expense of fully litigating the case. Instead, Defendant merely argues globally, that these issues "plainly satisfy" the definition of "controlling question of law. *See* Def.'s Motion at 7.

Importantly, not only are none of the issues Academy raised controlling questions of law, but it does not matter that the proposed Amended Order attempts to identify a controlling question **if the order does not show that the trial court made a substantive ruling on that controlling question of law**. *See Great Am. E & S Ins. Co. v. Lapolla Indus., Inc.*, No. 01–14–00372–CV, 2014 WL 2895770, at *1–3 (Tex. App.–Houston [1st Dist.] June 24, 2014, no pet.) (mem.op.).[3] It would be improper for this Court to find that its denial of Defendant's summary judgment motion

[3] Because an appellate court may only address an action taken by the trial court, the record presented upon a permissive appeal must reflect the trial court's substantive ruling on the specific legal issue presented for appellate-court determination. *See McCroskey v. Happy State Bank*, 2014 WL 869577, at *1 (Tex. App.—Amarillo Feb. 28, 2014, no pet.) (mem. op.); *Corp. of the Pres. of the Church of Jesus Christ of Latter–Day Saints v. Doe*, 2013 WL 5593441, at *2 (Tex. App.—Corpus Christi Oct. 10, 2013, no pet.) (mem. op.). Otherwise, the San Antonio Court of Appeals' opinion with regard to the requested legal determination would be an advisory opinion. *See McCroskey*, 2014 WL 869577, at *1; *Corp. of the Pres. of the Church of Jesus Christ of Latter–Day Saints*, 2013 WL 5593441, at *2. Thus, an affirmative indication of the trial court's substantive ruling on the specific legal issue presented for determination is a jurisdictional prerequisite to permissive appeal pursuant to Section 51.014(d). *See e.g.*, *Great Amer. E & S Ins. Co. v. Lapolla Ind., Inc.*, 2014 WL 2895770 at *1 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (mem. op.) (dismissing for want of jurisdiction).

involved a substantive ruling on these issues. *See City of San Antonio v. Tommy Harral Constr., Inc*., 486 S.W.3d 77, 80 (Tex. App.—San Antonio 2016, no pet.); *Eagle Gun Range, Inc. v. Bancalari*, 495 S.W.3d 887, 889 (Tex. App.—Fort Worth 2016, no pet.).

Having failed to meet its burden in both the Second Amended Motion for Summary Judgment and Motion to Permit Appeal, Defendant's Motion should be denied.

C. Defendant Has Failed to Establish That This Court's Ruling on Its Second Amended Motion for Summary Judgment Involved Substantial Ground for Difference of Opinion.

Defendant's conclusory statements notwithstanding, Defendant's Motion is devoid of any support for the notion that its requested controlling issues of law represent "substantial grounds for difference of opinion." While Defendant contends it is evident, based upon the summary judgment briefing, Defendant wholly failed to present this Court with any substantiation for a permissive appeal in this case.

To determine whether there is a substantial ground for difference of opinion, Courts must consider whether: (1) the question presented to the court is novel or difficult; (2) controlling law is doubtful; (3) controlling law is in disagreement with other courts of appeals; and (4) there simply is little authority upon which the district court can rely. *Gulf Coast Asphalt Co., L.L.C. v. Lloyd*, 457 S.W.3d 539, 544 (Tex. App.–Houston [14th Dist.] 2015, no pet.). In support of its argument that substantial ground for difference of opinion exists, Defendant argued that "the Plaintiffs presented novel and difficult questions of law and the parties cite conflicting authorities for this Court." Def.'s Motion at 8. If conflicting and competing motions and authorities were enough to establish a "substantial ground for difference of opinion" nearly every motion for summary judgment could be ripe for permissive appeal.

In short, Defendant has failed to meet its burden of establishing its right to a permissive appeal in this matter. Defendant's Motion should be denied.

D. An Immediate Appeal Will Materially Advance the Termination of this Litigation if and only if this Court erred in Denying Defendant's Second Amended Motion for Summary Judgment.

In arguing that a permissive appeal in this case will "materially advance the termination of this litigation" Defendant restates its prior unabashed conclusions—"there are no material issues of fact—only pure legal issues" and an appeal at this juncture would "considerably shorten the time, effort and expense involved in obtaining a final judgment," among others. *See* Def.'s Motion at 9. Defendant is so confident this Court erred in denying its summary judgment, it does not ask this Court for a motion for reconsideration, nor does it ask for an expedited trial so that final resolution of Plaintiffs' claims can be obtained. Instead, it asks to for an immediate appeal, certain that the San Antonio Court of Appeals will reverse this honorable Court. **Defendant is wrong**.

This Court carefully and painstakingly evaluated the issues raised in Defendant's Second Amended Motion for Summary Judgment and Plaintiffs' Response. This Court considered lengthy argument on the merits of this motion. If and only if this Court erred on February 4, 2019, when it denied Defendant's motion, will a permissive appeal "considerably shorten the time, effort and expense involved in obtaining a final judgment." Otherwise, this length and expense of this litigation doubled.

Should this Court grant Defendant permission and the intermediate appellate court agree, appellate briefing before the San Antonio Court of Appeals will commence. After nine to twelve months of briefing and argument, the parties can look to obtain an initial opinion—though either party, if dissatisfied, could appeal that decision to the Texas Supreme Court. During the interim, litigation before this Court will be hampered if not prohibited. In all likelihood, Defendant will seek to stay litigation before this Court, while the permissive appeal is considered.

Indeed, if and only if this Court erred in denying Defendant's Second Amended Motion for Summary Judgment will a permissive appeal in this matter materially advance the ultimate

termination of this litigation. Plaintiffs stand confident in upholding this Court's Order—but a permissive appeal in this juncture, based upon this Motion and the prior summary judgment briefing would not only be improper, but it would only add unnecessary delay, cost, and expense.

Defendant's motion should be denied.

CONCLUSION & PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request the Court deny Defendant Academy, Ltd. d/b/a Academy Sports + Outdoors's Motion to Permit Interlocutory Appeal of the Court's Summary Judgment Order and Motion to Amend the Summary Judgment Order and for any further relief at law or in equity to which Plaintiffs may show themselves to be entitled.

Respectfully Submitted,

O'HANLON, DEMERATH & CASTILLO, PC

/s/ Justin Demerath
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COUNSEL FOR PLAINTIFF ROBERT BRADEN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon the all known counsel of record ***via hand delivery, facsimile, electronic notification, and/or certified mail return receipt requested*** on March 19, 2019.

/s/ Justin Demerath
Justin Demerath

CAUSE NO. 2017-CI-23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF F.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR; ***Plaintiffs,***	§	**IN THE DISTRICT COURT**
v.	§	**BEXAR COUNTY, TEXAS**
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS, ***Defendant.***	§	**224TH JUDICIAL DISTRICT**

COMBINED FOR PRETRIAL MATTERS WITH

CAUSE NO. 2018-CI-14368

ROSANNE SOLIS AND JOAQUIN RAMIREZ, ***Plaintiffs,***	§	**IN THE DISTRICT COURT**
v.	§	**BEXAR COUNTY, TEXAS**
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS, ***Defendant.***	§	**438TH JUDICIAL DISTRICT**

EXHIBIT 1

MR 652

CAUSE NO. 2018-CI-23302

ROBERT BRADEN,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
	§	
	§	
v.	§	
	§	**BEXAR COUNTY, TEXAS**
	§	
	§	
ACADEMY, LTD. D/B/A ACADEMY	§	
SPORTS + OUTDOORS,	§	
Defendant.	§	**408TH JUDICIAL DISTRICT**

CAUSE NO. 2018-CI-23299

CHANCIE MCMAHAN,	§	**IN THE DISTRICT COURT**
INDIVIDUALLY AND AS NEXT	§	
FRIEND OF R.W., A MINOR; ROY	§	
WHITE, INDIVIDUALLY AND AS	§	
REPRESENTATIVE OF THE ESTATE	§	
OF LULA WHITE; AND SCOTT	§	
HOLCOMBE;	§	
Plaintiffs,	§	
	§	
v.	§	**BEXAR COUNTY, TEXAS**
	§	
	§	
	§	
	§	
	§	
	§	
	§	
	§	
ACADEMY, LTD. D/B/A ACADEMY	§	
SPORTS + OUTDOORS,	§	
Defendant.	§	**285TH JUDICIAL DISTRICT**

Order on Summary Judgment

Defendant Academy, Ltd. d/b/a Academy Sports + Outdoors's Second Amended Motion for Traditional Summary Judgment is denied.

MR 653

Signed and entered February 4, 2019.

Hon. Karen H. Pozza

MR 654

TAB L

KAREN H. POZZA
JUDGE, 407TH JUDICIAL DISTRICT

100 DOLOROSA ST.
SAN ANTONIO, TEXAS 78205
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	Jason C. Webster	jwebster@thewebsterlawfirm.com

Date: 3/20/19

Re: 2017-CI-23341, *Ward v. Academy*
2018-CI-14368, *Solis v. Academy*
2018-CI-23302, *Braden v. Academy*
2018-CI-23299, *McMahan v. Academy*

Counsel,

Thank you again for your excellent presentations. The order is attached.

Please forward this communication to any party or attorney not listed above.

If you wish to keep the materials presented to the court, please pick them up from 407th court clerk Mary Velasquez before the end of this week.

Thank you,

Karen H. Pozza
Judge, 407th District Court

CAUSE NO. 2017-CI-23341

CHRIS WARD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATES OF JOANN WARD, DECEASED AND B.W., DECEASED MINOR, AND AS NEXT FRIEND OF F.W., A MINOR; ROBERT LOOKINGBILL; AND DALIA LOOKINGBILL, INDIVIDUALLY AND AS NEXT FRIEND OF R.G., A MINOR, AND AS REPRESENTATIVES OF THE ESTATE OF E.G., DECEASED MINOR;	§	**IN THE DISTRICT COURT**
***Plaintiffs*,**	§	
v.	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
Defendant.	§	
	§	**BEXAR COUNTY, TEXAS**
	§	
	§	**224TH JUDICIAL DISTRICT**

COMBINED FOR PRETRIAL MATTERS WITH

CAUSE NO. 2018-CI-14368

ROSANNE SOLIS AND JOAQUIN RAMIREZ,	§	**IN THE DISTRICT COURT**
***Plaintiffs*,**	§	
v.	§	
	§	**BEXAR COUNTY, TEXAS**
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
Defendant.	§	
	§	**438TH JUDICIAL DISTRICT**

CAUSE NO. 2018-CI-23302

ROBERT BRADEN,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
	§	
	§	
v.	§	
	§	**BEXAR COUNTY, TEXAS**
	§	
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
	§	
Defendant.	§	**408TH JUDICIAL DISTRICT**

CAUSE NO. 2018-CI-23299

CHANCIE MCMAHAN, INDIVIDUALLY AND AS NEXT FRIEND OF R.W., A MINOR; ROY WHITE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF LULA WHITE; AND SCOTT HOLCOMBE;	§	**IN THE DISTRICT COURT**
Plaintiffs,	§	
	§	
v.	§	**BEXAR COUNTY, TEXAS**
	§	
	§	
	§	
	§	
	§	
	§	
	§	
ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,	§	
	§	
Defendant.	§	**285TH JUDICIAL DISTRICT**

Order on Motion to Permit Interlocutory Appeal

Defendant Academy, Ltd. d/b/a Academy Sports + Outdoors's Motion to Permit Interlocutory Appeal of the Court's Summary Judgment Order and Motion to Amend the

Summary Judgment Order is denied.

Signed and entered March 20, 2019.

Hon. Karen H. Pozza

TAB M

Fourth Court of Appeals
San Antonio, Texas

May 22, 2019

No. 04-19-00219-CV

IN RE ACADEMY, LTD. DBA ACADEMY SPORTS AND OUTDOORS

Original Mandamus Proceeding[1]

ORDER

Sitting: Sandee Bryan Marion, Chief Justice[2]
Irene Rios, Justice
Beth Watkins, Justice

On April 9, relator filed a petition for writ of mandamus. After considering the petition, this court concludes relator is not entitled to the relief sought. Accordingly, the petition for writ of mandamus is DENIED. *See* TEX. R. APP. P. 52.8(a).

It is so **ORDERED** on May 22, 2019.

Irene Rios, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 22nd day of May, 2019.

Keith E. Hottle, Clerk of Court

[1] This proceeding arises out of Cause Nos. 2017CI23341; 2018CI14368; 2018CI23302; 2018CI23299, styled *Robert Braden v. Academy, Ltd. d/b/a Academy Sports + Outdoors* and *Chancie McMahan, et al. v. Academy, Ltd. d/b/a Academy Sports + Outdoors*, pending in the 224th Judicial District Court, Bexar County, Texas, the Honorable Karen H. Pozza presiding.

[2] Chief Justice Marion dissents to the denial without requesting a response.

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00219-CV

IN RE ACADEMY, LTD. DBA ACADEMY SPORTS AND OUTDOORS

Original Mandamus Proceeding[1]

PER CURIAM

Sitting: Sandee Bryan Marion, Chief Justice[2]
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: May 22, 2019

PETITION FOR WRIT OF MANDAMUS DENIED

On April 9, relator filed a petition for writ of mandamus. After considering the petition, this court concludes relator is not entitled to the relief sought. Accordingly, the petition for writ of mandamus is denied. *See* TEX. R. APP. P. 52.8(a).

PER CURIAM

[1] This proceeding arises out of Cause Nos. 2017CI23341; 2018CI14368; 2018CI23302; 2018CI23299, styled *Robert Braden v. Academy, Ltd. d/b/a Academy Sports + Outdoors* and *Chancie McMahan, et al. v. Academy, Ltd. d/b/a Academy Sports + Outdoors*, pending in the 224th Judicial District Court, Bexar County, Texas, the Honorable Karen H. Pozza presiding.

[2] Chief Justice Marion dissents to the denial without requesting a response.

TAB N

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JON HOLCOMBE ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. SA-18-CV-555-XR
	§	
UNITED STATES OF AMERICA,	§	*Consolidated with*:
	§	Nos. 5:18-CV-712-XR;
Defendant.	§	5:18-CV-881-XR; 5:18-CV-944-XR;
	§	5:18-CV-949-XR; 5:18-CV-951-XR;
	§	5:18-CV-1151-XR; 5:19-CV-184-XR;
	§	5:19-CV-289-XR; 5:19-CV-506-XR
	§	

ORDER ON MOTION TO DISMISS

On this date, the Court considered the Government's Motion to Dismiss for Lack of Jurisdiction (docket no. 28), Plaintiffs' response (docket no. 44), the Government's reply (docket no. 45), Plaintiffs' sur-reply (docket no. 51), and the Government's sur-sur-reply (docket no. 52). After careful consideration, the Court GRANTS IN PART AND DENIES IN PART the Government's motion.

1. Background

These cases stem from the 2017 mass shooting in Sutherland Springs, Texas. On November 5, 2017, Devin Patrick Kelley killed 26 churchgoers and injured 20 more. Among the plaintiffs in these consolidated cases are surviving churchgoers and relatives of those killed. They seek recovery against the United States under the Federal Tort Claims Act. Kelley purchased the firearms he used to kill or injure Plaintiffs and Plaintiffs' family members at an Academy Sports & Outdoors on April 7, 2016. The thrust of this lawsuit is that Kelley should

not have been able to purchase these firearms, but failures by the United States Air Force and Department of Defense to collect, handle, and report required information allowed him to do so.

Federal law prohibits certain categories of people from buying firearms. *See* 18 U.S.C. § 922. Devin Kelley fit several of these categories: he was convicted of a crime punishable by imprisonment of more than one year, he was committed to a mental institution, he was dishonorably discharged from the Armed Forces, and he was convicted of a crime of domestic violence. Yet despite having the duty to process and report this information, the Air Force did not, so when the retailer ran his name through the background check system it learned no disqualifying information. Here, Plaintiffs seek to hold the Government accountable for this failure.

a. Devin Kelly

Devin Kelley entered active duty as an airman with the United States Air Force ("USAF") in January 2010.[1] Kelley was initially assigned to an Intelligence Specialist program but was cut from the program due to poor grades. He was transferred to the 49th Logistics Readiness Program. Kelley was stationed at Holloman Air Force Base in Otero County, New Mexico.

Between July 2011 and March 2012, USAF placed in Kelley's file at least four letters of counseling and at least five letters of reprimand. Kelley was known to have made threats against his USAF superiors. Officers were advised that Kelley was attempting to carry out death threats made to his commanding officers. Kelley was known to have attempted to

[1] The Court takes these facts, where possible, from the parties' joint stipulated facts or Plaintiffs' recitation of facts not stipulated, docket no. 24, and takes the remainder from the consolidated complaints.

smuggle guns onto a USAF base in violation of base operating procedures and USAF regulations.

On April 12, 2011, Kelley married Tessa K. Loge, who had an infant son from a previous marriage. Loge moved into USAF base housing. Kelley committed acts of domestic violence against Loge and her son. On June 8, 2011, Loge took her son to Gerald Champion Medical Center in Alamogordo, New Mexico because he was vomiting. The attending pediatrician also noticed febrile seizure and facial bruising. A CT scan revealed a fractured clavicle and subdural hemorrhage. Kelley produced a video confessing to USAF that he caused these injuries, and a Court Martial was convened. The NM Children, Youth, and Families Department took the child into their custody.

During Kelley's pre- and post-trial confinement, USAF placed him on lockdown for suicide risk. While these charges were pending, in spring 2012 USAF involuntarily committed Kelley to Peak Behavioral Health Services, located in Santa Teresa, New Mexico, which has a dedicated unit for U.S. military personnel. As a basis for committing Kelley, USAF noted:

> The Evidence shows a serious escalation of behavior involving firearms and threats after the physical abuse of a child. Particularly alarming is his decision to try to obtain another firearm while undergoing inpatient mental health care, conducting research on body armor, and then escaping from the facility late at night without authorization . . . .
>
> Lesser forms of restraint are inadequate to mitigate the flight risk he poses nor would they prevent him from carrying out the threats that he has made against others, especially given the forethought and planning that he showed by attempting to purchase another firearm and his escape from the mental health facility.

On June 7, 2012, Kelley jumped a fence and escaped from the facility. He was apprehended by local law enforcement personnel, who noted that Kelley was a "danger to himself and others." While a detainee at the facility, Kelley attempted to buy firearms and

tactical gear online and have these items shipped to San Antonio, Texas. USAF was aware that Kelley attempted to do so. Kelley threatened that if he were picked up by Security Forces, he would go for their guns. On July 10, 2012, USAF determined that Kelley should be confined while awaiting trial because it was foreseeable that he would not appear for trial or would engage in serious criminal misconduct.

A Court Martial considered charges against Kelley for: fleeing Peak Behavior Health Services Facility; causing physical injury to his stepson; holding a gun to Loge's temple and asking if she wanted to die; and threatening to kill Loge, members of her family, and members of his squadron. Kelley was charged with pointing a loaded gun at Loge and two counts of threatening his spouse with an unloaded firearm. On November 7, 2012, Kelley pled guilty to striking Loge, choking her, pulling her hair, and kicking her and to assaulting his stepson with "force likely to produce death or grievous bodily harm." He was sentenced to 12 months of imprisonment, a bad-conduct discharge, and reduction in rank to airman basic. USAF discharged Kelley with a "bad conduct discharge."

b. Statutory Context

Under federal law, people with certain characteristics cannot buy or own firearms (18 U.S.C. § 922(g)) and dealers cannot sell to those so disqualified (18 U.S.C. § 922(d)). These disqualifying characteristics include, as relevant here, those with a misdemeanor domestic violence conviction, those convicted of a crime punishable by more than a year, those dishonorably discharged from the military, and those involuntarily committed to a mental institution.

The Brady Handgun Violence Prevention Act, passed in 1993, tasked the Attorney General with the establishment of the national instant criminal background check system ("NICS"). *See* 34 U.S.C. § 40901. The Attorney General delegated this task to the FBI. The FBI, in administering NICS, performs background checks on those who try to buy a firearm from a federally licensed gun dealer. As provided in the Brady Act implementing regulations, when NICS receives a background check request, NICS must respond with "Proceed" (the go-ahead signal), "Denied" (stopping the sale), or "Delayed" (additional information required). 28 C.F.R. § 25.6(c)(iv)(A)-(C).

Federal agencies, including USAF and DOD, are obligated to report disqualifying information to NICS. Federal agencies that have "any record of any person demonstrating" that the person should not be able to purchase a gun "shall, not less frequently than quarterly, provide the pertinent information contained in such record to" NICS. 34 U.S.C. § 40901(e)(1)(C).

This Brady Act reporting requirement and the reporting requirements of various other federal statutes (including the Uniform Federal Crime Reporting Act of 1988 and the Victim's Rights and Restitution Act of 1990) are made DOD policy in Department of Defense Manual 7730.47. Further, Department of Defense Manual 7730.47-M Volume 1, Enclosure 3 implements the policy of Manual 7730-47 and prescribes reporting requirements pursuant to the various federal laws.

This manual sets out a central DOD repository, Defense Incident-Based Reporting System ("DIBRS"), which is to include incidents of domestic violence and criminal data. DOD uses this to transmit reportable crimes to the FBI's databases, which are used in

background searches. DIBRS was created because, "[i]n addition to meeting the mandatory statutory requirements, ... [DOD has] been faced with increasing requests from Congress, the Department of Justice, and other agencies for statistical data on criminal offenses[.]" Manual 7730.47-M Volume 1, Enclosure 3 at 11. "These requests necessitate improvements in the ability of [DOD] to track a crime or incident through the law enforcement, criminal investigation, command action, judicial, and corrections phases." *Id.*

c. DOD's and USAF's History of Reporting Failure

Despite these federal reporting obligations, as incorporated in and implemented by the DIBRS system, USAF and DOD have consistently mis- or under-reported required information.

In 2014, the DOD's Inspector General ("IG") evaluated compliance with DOD's reporting procedures. The investigation concluded that

> 10 years of DoD criminal incident data have not been provided to the FBI for inclusion in the annual uniform crime reports to the President, the Congress, State governments, and officials of localities and institutions participating in the UCR Program, as implemented in DoD Directive 7730.47 and DoD Manual 7730.47‑M, Volume 1.

In the time period sampled, Air Force Security Forces failed to submit fingerprint cards and final disposition reports in 60 percent of cases.

Then, in February 2015, the IG conducted a comprehensive review of the failures of the branches of the U.S. military to promptly and accurately input criminal conviction information into the appropriate computer databases. This study found that, between June 2010 and October 31, 2012,[2] from a sample of 358 convictions that required reporting, USAF submitted 248 fingerprint cards and 245 final dispositions. As part of this report, the IG made

[2] Kelley's conviction was in November 2012.

recommendations to USAF. The first recommendation was for USAF to submit and enter the missing fingerprint and final criminal disposition information for the sample period into the appropriate databases. Another recommendation was for USAF to "take prompt action" to ensure that all arrestee information is properly reported. USAF agreed to both recommendations.

Finally, a 2017 IG report found that USAF did not remedy its reporting problems. In the sample taken for this report, USAF was deficient in reporting fingerprints and final dispositions in 94 percent of cases. Referring to the Sutherland Springs shooting, this IG report stated "[a]ny missing fingerprint card and final disposition report can have serious, even tragic consequences, as may have occurred in the recent church shooting in Texas."

Specifically here, while USAF was required to enter Kelley's conviction and criminal history into federal databases, USAF did not do so. USAF allegedly did not report Devin Kelley's domestic violence conviction, his incarceration for a crime punishable by more than one year, his commitment to psychiatric inpatient care, or his bad conduct discharge post-court martial to NICS, the Interstate Identification Index, or the National Crime Information Center.

d. Sutherland Springs Shooting

Between 2016 and 2017, Kelley purchased guns in Colorado and Texas. These dealers received "Proceed" signals from NICS due to USAF's and DOD's reporting failures. Then, on September 5, 2017, Kelley used at least one of these guns when he entered First Baptist Church and killed 26 people and injured 20 others.

Plaintiffs are the victims and the victims' relatives. Joe and Claryce Holcombe are the parents of decedent John Bryan Holcombe, who was killed in the Sutherland Springs shooting

(18-555). Margarette Vidal was shot four times during the shooting—Monica Shabbir, Robert Vidal, and Ramiro Vidal, Jr. are Vidal's children (18-712). Charlene Uhl is the parent of decedent Kaley Krueger (18-881). Gary Ramsey and Ronald Ramsey, Jr. are the sons of decedent Therese Rodriguez (18-944). Lisa McNulty is the mother and H.M. and J.M. are the children of decedent Tara McNulty (18-949). Kati Wall, Michael Johnson, Christopher Johnson, Dennis Johnson, Jr., Deanna Staton, and James Graham are the children of decedents Sara Johnson and Dennis Johnson (18-951). Regina Amador is the daughter and Jose Rodriguez and Guadalupe Rodriguez are the parents of decedent Richard Rodriguez (18-1151). Farida Brown was injured in the shooting (19-184). Christopher Ward brings his claims on behalf of the estate of the deceased JoAnn Ward and B.W., a minor, and on behalf of R.W., a minor injured in the shooting (19-289). Kris Workman (19-506) was shot eight times during the shooting. Plaintiffs' counsel has indicated that additional suits will follow pending exhaustion of administrative remedies.

e. Summary of Claims

Plaintiffs filed their complaints individually, which for efficiency were consolidated under the above-captioned case, as it was first filed. The way the complaints depict the Government's negligence varies slightly, but at bottom they allege USAF and DOD were negligent in failing to submit or submitting inaccurate or incomplete information related to Kelley. Along the way, Plaintiffs allege these entities were negligent in their training and supervision, processing and recording of information, and other acts. Thus, Plaintiffs bring claims for negligence *per se* based on violation of the Brady Act, negligent undertaking, and negligent training and supervision.

2. Discussion

a. Standard for Dismissal Under Rule 12(b)(1)

The Government moves the Court to dismiss this case for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure Rule 12(b)(1). Dismissal is proper under Rule 12(b)(1) "when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). The party asserting federal jurisdiction bears the burden of proving jurisdiction. *In re FEMA Trailer Formaldehyde Products Liab. Litig.*, 646 F.3d 185, 189 (5th Cir. 2011). When considering a motion to dismiss for lack of jurisdiction, courts may consider evidence outside of the complaint and dismiss on the bases of: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Clark v. Tarrant County*, 798 F.2d 736, 741 (5th Cir. 1986). In determining whether subject-matter jurisdiction exists, "[c]ourts must strictly construe all waivers of the federal government's sovereign immunity, [resolving] all ambiguities in favor of the sovereign." *Linkous v. United States*, 142 F.3d 271, 275 (5th Cir. 1998).

b. Federal Tort Claims Act

"The Federal Tort Claims Act, subject to several exceptions, waives the sovereign immunity of the United States, making it liable in tort 'in the same manner and to the same extent as a private individual under like circumstances,' 28 U.S.C. § 2674, for certain damages 'caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the

United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.' 28 U.S.C. § 1346(b) (emphasis added)." *Johnson v. Sawyer*, 47 F.3d 716, 727 (5th Cir. 1995). "While as a matter of abstract linguistics the phrase 'law of the place where the act or omission occurred' might be thought to include generally applicable federal law, it has long been settled that it does not, and that 'the liability of the United States under the Act [FTCA] arises only when the law of the state would impose it.'" *Id.* (quoting *Brown v. United States*, 653 F.2d 196, 201 (5th Cir. 1981). Here, Texas provides the applicable state law.

c. The Government's Motion to Dismiss

The Government presents several bases for dismissal. First, the Government argues the United States cannot be held liable here because Texas law would not impose liability on a private person under analogous circumstances. Alternatively, the Government argues that the FTCA's misrepresentation exception strips jurisdiction here, and in any event the Brady Act itself immunizes the United States against claims related to the background check system's operation.

Here, the Court considers first whether the misrepresentation exception bars the claims and whether the Brady Act immunizes the United States against them. If any of Plaintiffs' legal theories clear these two hurdles, the Court will decide whether Texas law recognizes liability for private persons under analogous circumstances.

i. Misrepresentation Exception

There are several exceptions to the FTCA's waiver of sovereign immunity. The exception relevant here retains sovereign immunity as to "[a]ny claim arising out of . . .

misrepresentation [or] deceit." 28 U.S.C. § 2680(h). This misrepresentation exception bars claims for both negligent and intentional misrepresentation and applies to both affirmative acts and omissions of material fact. *Metro. Life Ins. Co. v. Atkins*, 225 F.3d 510, 512 (5th Cir. 2000).

In *Life Partners*, the most recent case in which the Fifth Circuit discusses the misrepresentation exception at length, the court summarized the two leading Supreme Court precedents as follows:

> The Supreme Court has considered the scope of the misrepresentation exception in two leading cases, *United States v. Neustadt*, 366 U.S. 696, 81 S.Ct. 1294, 6 L.Ed.2d 614 (1961), and [*Block v. Neal*, 460 U.S. 289, 103 S.Ct. 1089 (1983)]. In *Neustadt*, the Court held that a suit alleging that the plaintiffs bought a home for more than it was worth based on a negligent appraisal was barred. 366 U.S. at 711, 81 S.Ct. 1294. The plaintiffs alleged that the inaccurate appraisal resulted from a negligent inspection, not from a misrepresentation. *Id.* at 704–05, 81 S.Ct. 1294. The Court, however, held that the damage, the payment of a purchase price in excess of the home's fair market value, arose out of negligent misrepresentation, even if the government also negligently conducted the inspection. *Id.*; *see Ware v. United States*, 626 F.2d 1278, 1283 (5th Cir. 1980). The plaintiffs would not have purchased the home, and therefore suffered the harm, without the misrepresentation.
>
> In *Block*, the Court distinguished *Neustadt*, holding that a similar claim was not barred. 460 U.S. at 296, 103 S.Ct. 1089. There, after the plaintiff contracted for the construction of a home, the Farmers Home Administration (FmHA) agreed to supervise construction. *Id.* The FmHA employee inspected the home three times, issuing a final report indicating that the construction accorded with the specifications approved by the FmHA. When the plaintiff bought the home and later discovered extensive defects, she sued the FmHA. Although the government argued that Neal's damages were caused by the inspection reports, and therefore her claim was barred as one for misrepresentation, the Court held that the injury Neal alleged, a defective house, arose from the FmHA's failure to oversee construction. Id. at 297–98, 103 S.Ct. 1089. The plaintiff alleged an injury she "would have suffered independently of [her] reliance on the erroneous [representation]." *Id.* at 296–97, 103 S.Ct. 1089. The plaintiff's reliance on the FmHA's misrepresentation did not cause the defects in the home; rather, they were caused by the FmHA's negligence in failing to oversee construction.

Life Partners, Inc. v. United States, 650 F.3d 1026, 1031 (5th Cir. 2011).

From these cases, the Fifth Circuit derived a two-step process for deciding whether the misrepresentation exceptions bars a claim. *Commercial Union Ins. Co. v. United States*, 928 F.2d 176, 179 (5th Cir. 1991). Courts first ask "whether 'the chain of causation' from the alleged negligence to the injury depends upon a misrepresentation by a government agent." *Life Partners*, 650 F.3d at 1031. Relevant to this question is whether "the focal point of the claim is negligence in the communication of (or failure to communicate) information or negligence in the performance of an operational task, with misrepresentation being merely collateral to such performance." *Atkins*, 225 F.3d at 512. Because courts "focus on the conduct upon which the plaintiff's claim is based," Plaintiffs' choice of pleading does not control. *Life Partners*, 650 F.3d at 1032 (quoting *Truman v. United States*, 26 F.3d 592, 592 (5th Cir. 1994)).

Second, if the claim does depend on a misrepresentation, courts ask "whether Congress has nonetheless waived sovereign immunity independently of the FTCA." *Life Partners*, 650 F.3d at 1032 (quoting *Commercial Union*, 928 F.2d at 179). Here, the only waiver of immunity cited by Plaintiffs is the FTCA, so the Court's inquiry is limited to the first step. "The FTCA's misrepresentation exception is broad: it bars any claim arising out of a misrepresentation—even if the conduct underlying the claim may also constitute a tort not barred by section 2680(h)." *Life Partners*, 650 F.3d at 1032. "[T]he line between what constitutes a permissible negligence claim and a barred misrepresentation claim has not been clearly delineated." *Saraw Partnership v. United States*, 67 F.3d 567, 570 (5th Cir. 1995).

In *Life Partners*, the Fifth Circuit summarizes this Circuit's applicable precedents:

> In *Atkins*, a case also involving insurance beneficiaries, we reversed the dismissal of a claim alleging that the government had improperly failed to

include the beneficiary form signed by the decedent in his file. [*Metro. Life Ins. Co. v. Atkins*, 225 F.3d 510, 511-12 (5th Cir. 2000)]. The district court held, and the government argued, that the claim was one for misrepresentation because the federal employee had failed to communicate to the decedent that his personnel file did not include a signed copy of the beneficiary form. *Id*. at 512. We held that the injury was caused by the government's failure to keep the signed form, irrespective of any failure to communicate. *Id*. Because the injury arose from the negligent performance of an operational task, it was not barred.

We have also held that a claim was not barred when the Veterans' Administration failed to enter the plaintiff's loan payment properly, resulting in foreclosure of the plaintiff's property. *Saraw P'ship*, 67 F.3d at 571. The government argued that any injury was caused by the government's failure to communicate that it had not received the plaintiff's payment. Id. at 570–71. We rejected that argument, holding, "This case is not about reliance on faulty information or on the lack of proper information; rather, the gist of this case is the government's careless handling of Saraw's loan payments." *Id*.

Likewise, we have reversed the dismissal of a claim alleging that the Department of Agriculture mis-diagnosed and then itself killed a rancher's cattle. [*Ware v. United States*, 626 F.2d 1278, 1282-83 (5th Cir. 1980)]. The government argued that the claim was barred because a mis-diagnosis is a misrepresentation. We noted, however, that the plaintiff had not taken any action in reliance on that mis-diagnosis, which is required for a misrepresentation claim; rather, the government had killed the cattle, causing the damage itself. *Id*. at 1283. "The government's misrepresentation caused Ware to do nothing save remain in ignorance that he had suffered a compensable loss." *Id*. Importantly, the misrepresentations in the above cases were merely collateral to the focal point of the claims, "negligence in the performance of an operational task." *See Atkins*, 225 F.3d at 512.

In contrast, we have affirmed the dismissal of a claim based on the FHA's miscalculation of the predicted 50-year flood plane when approving a subdivision plan, holding that the damages sought resulted "solely from the fact that the government communicated its miscalculation to the developer who relied on it, and that reliance eventually caused the plaintiffs' damages." *Baroni v. United States*, 662 F.2d 287, 289 (5th Cir. 1981); see also [*McNeily v. United States*, 6 F.3d 343, 347 (5th Cir. 1993)]. We also affirmed the dismissal of a claim based on the FmHA's unfulfilled promise to give a farmer a loan if he sold some of his land, which in turn caused him to be ineligible for the loan. *Williamson v. U.S. Dep't of Agric*., 815 F.2d 368, 378 (5th Cir. 1987). Because the plaintiff had relied on the FmHA's representation that he would receive a loan in selling his land, his claim was barred. *Id*.

650 F.3d at 1032–33.

After summarizing these cases, the *Life Partners* court stated that "[i]n sum, a claim for injury arising from a plaintiff's reliance on a misrepresentation is barred by the FTCA; a claim alleging injury independent of the misrepresentation, such as one in which government action directly caused the injury, is not barred." *Id.*

The *Life Partners* court then upheld a finding that the plaintiff's claims arose from a misrepresentation. That plaintiff contacted the Small Business Administration to confirm that an insurance policy had not been assigned to another party, and the SBA mistakenly told the plaintiff that it had not. The plaintiff purchased the policy and later sued for its damages. The *Life Partners* court found that this injury "arose from its actions in reliance on the SBA's misrepresentations" and the misrepresentation exception thus barred the claim. The court noted that the records correctly reflected the previous assignment, so the records were not kept negligently like in *Atkins*, nor did a government employee fail to check these records. Instead, the employee had actual knowledge of the previous assignment but misrepresented this information anyway. "Simply put, Life Partners would have suffered no injury absent the misrepresentation, because it otherwise would not have purchased the policy." *Id.*

Relying on *Life Partners* and *Commercial Union*, the Government argues this exception bars Plaintiffs' claims because

> [h]ere, the transmission of misinformation (or the failure to communicate accurate information) to the licensed firearms dealer from whom Kelley purchased firearms is a necessary link in the causal chain that led to the Plaintiffs' injury. In order to bring an action against the United States, the Plaintiffs necessarily must allege that NICS failed to inform the dealer that receipt of the firearm by Kelley would violate Federal law. That communication between NICS and the dealer was the indispensable nexus between any alleged negligence and the injuries alleged. Indeed, the entire NICS apparatus exists solely to communicate information to firearms dealers, which is then relied upon by the dealers when consummating firearm sales. Accordingly, the Plaintiffs' claims are rooted in communications (or the failure

> to communicate) by government employees that are causally linked to the decedent's injuries.

Docket no. 28 at 37.

1. The exception does not apply because Plaintiffs did not rely, even indirectly, on a governmental representation

In response, Plaintiffs point to limiting language in *Block*, arguing that the Supreme Court foreclosed in that case the broad application of this exception that the Government here advances. The *Block* court stated that the misrepresentation exception applies when "the essence of an action for misrepresentation, whether negligent or intentional, is the communication of information *on which the recipient relies*." *Block*, 460 U.S. at 296 (emphasis added). And in *Saraw Partnership v. U.S.*, the Fifth Circuit stated that "[w]here there is no detrimental reliance on an alleged miscommunication, no claim for misrepresentation is made." 67 F.3d 567, 571 (5th Cir. 1995). Without reliance on any governmental statement, then, Plaintiffs argue the exception cannot apply, and Plaintiffs argue there was no such reliance here.

The Government counters this reliance argument with *Baroni*, which found that even though the plaintiffs had not relied on the government's miscalculation of the flood plain, the developer did so rely, and that reliance was a link in the chain that led the plaintiffs to purchase their home and subsequently caused the plaintiffs' injuries. 662 F.2d at 289. The Government argues that, here, the gun retailers relied on a governmental communication to proceed with the purchases, and that this indirect reliance is sufficient for the misrepresentation exception to apply.

The Court is not persuaded. For one thing, there is not even indirect reliance on Plaintiffs' part anywhere in the chain of causation. In *Baroni*, the plaintiffs' purchase decision indirectly relied on the misrepresentation—they relied on the representations of one who relied on the government's misstatement. But here that is not the case. The cases make clear that *some* reliance on plaintiffs' part is necessary,[3] although cases like *Baroni* show that sometimes this hurdle is met even where the government's communication was not represented to the plaintiff directly.[4] But in this case, even a far-reaching application of the "vital link" argument the Government advances would fail. Plaintiffs simply did not rely on a governmental statement of any kind—not even indirectly. They did not rely on any representation that was buttressed by a governmental misstatement. It is true that the gun retailers relied on some government representation (the "Proceed" signal from NICS) in selling Kelley the firearms, but Plaintiffs did not rely on this representation to their detriment. For another thing, as discussed below, the Court views Plaintiffs' claims as alleging operational negligence, not negligent communication. Any miscommunication in the chain of causation is merely collateral.

Thus, the misrepresentation exception to the FTCA's immunity waiver does not bar Plaintiffs' claims for lack of any reliance to Plaintiffs' detriment. Even if the claims were

[3] For example, *Life Partners*, in summarizing *Ware*, stated that "the plaintiff [in *Ware*] had not taken any action in reliance on th[e] misdiagnosis, which is required for a misrepresentation claim[.]" 650 F.3d at 1033. *Life Partners* then stated that, "[i]n sum, a claim for injury arising from a plaintiff's reliance on a misrepresentation is barred by the FTCA . . . ." *Id.*; *see also Kim v. United States*, 2017 WL 5158709 (E.D. Cal. Nov. 7, 2017) ("Circuit courts have . . . held that a claim must contain the essential elements of misrepresentation to come within the exception . . . . One relatively non-controversial element is that the plaintiffs have relied on the representation to their detriment.").

[4] Also, *Baroni* was decided before *Block* and its progeny, which inclines the Court not to rely on *Baroni* as anything more than one factual example in the line of cases beginning with *Neustadt*.

centered on representations or failures to communicate, then, the exception would not apply. But the Court also finds that Plaintiffs' complaint centers on operational negligence, which is an additional basis on which Plaintiffs successfully avoid the misrepresentation exception.

2. Additionally, the exception does not apply because Plaintiffs allege operational negligence, not communication failure

As mentioned above, Plaintiffs note that the case law distinguishes between the communication of information (barred by the misrepresentation exception) and the performance of operational tasks (not barred). They argue that their claims fall into the latter category: operational negligence—"*i.e.*, the Government's negligent failure to collect, submit, or process information into the national background-check system, as required by statute." Docket no. 44 at 37. They argue the "gist" of the case is operational negligence in failing to properly run the background-check system, and any governmental communications were merely collateral. *Id.* at 40.

The Fifth Circuit, in *Saraw Partnership*, stated that

> [t]o determine whether a claim is one for misrepresentation or negligence the court examines the distinction between the performance of operational tasks and the communication of information. The government is liable for injuries resulting from negligence in performance of operational tasks even though misrepresentations are collaterally involved. It is not liable, however, for injuries resulting from commercial decisions made in reliance on government misrepresentations.

67 F.3d at 571 (citing *Mundy*, 983 F.2d at 952).

In *Mundy*, the government misfiled paperwork related to a contractor's application for security clearance. 983 F.2d at 952. This resulted in denial of the application. The government told the contractor's employer about the denial, and in turn the employer fired the contractor. Although the government communicated the denial to the employer, the Ninth Circuit held

that the communication was not a misrepresentation. The court reasoned that the real cause of the injury was the negligent application procession, which was actionable under the FTCA:

> The Government was negligent, Mundy asserts, in misfiling a document and in subsequently overlooking that document during the processing of his security clearance request. Although the Government necessarily communicated the result of this operational task to [the employer], the communication was not a misrepresentation: the security clearance in fact had been denied. Viewed in this way, the communication was only "collaterally involved" in Mundy's injury. The Government's alleged operational error—overlooking a misfiling in processing Mundy's security clearance—remains the focal point of this suit.

Id.

In *Saraw Partnership*, the Fifth Circuit held that the claims were not barred by the misrepresentation exception for lack of reliance, as discussed above, and because the gist of the case was operational negligence. 67 F.3d at 570-71. The plaintiffs purchased property, a transaction the Veterans' Administration financed. *Id.* at 568-69. Payment coupons from the VA were meant to finance the loan payments, but a VA employee's erroneous data entry caused a coupon book not to be issued. Plaintiffs thus could not make loan payments and the house was foreclosed upon. Relying on *Mundy*, the Fifth Circuit found the "erroneous keypunch" caused the injury, so the proper focal point was the "alleged negligently-performed operational task of the government," not "reliance on faulty information or on the lack of proper information[.]" *Id.* at 571.

In *Atkins*, another case discussed above, the alleged harm was caused by negligent performance of an operational task because the claims "alleg[e] that the United States employee failed to preserve and properly file the correct copy—that is, the signed copy—of [plaintiff's] form." 225 F.3d at 513.

In a Western District of Texas case, the plaintiff complained of negligent FDA inspection, which the court found to be an operational task. *Lone Star Bakery, Inc. v. United States*, 2007 WL 321405, at *4 (W.D. Tex. Jan. 11, 2007). The improper reporting alleged by the plaintiff was collateral because "[a] breach of the FDA's regulatory duties to inspect does not depend on the transmission of erroneous information, regardless of what information was actually transmitted." *Id.*

Here, the gravamen of Plaintiffs' allegations is the Government's negligence in performing the operational task of collecting, handling, processing, and entering Kelley's background information into the national background check system.

Even if the Court were inclined to accept the Government's argument, the "misrepresentation" that the gun retailers received was not a misrepresentation at all. NICS did not have record of Kelley due to the Government's systemic operational negligence. *Life Partners* hints at this distinction: in *Atkins* there was operational negligence in failure to keep accurate records, but in *Life Partners* the records were correct and yet the government official misrepresented the information anyway. 650 F.3d at 1033. In *Mundy*, also, the Ninth Circuit stated "[a]lthough the Government necessarily communicated the result of [its] operational task to [the employer], the communication was not a misrepresentation: the security clearance in fact had been denied." 983 F.2d at 952. Here, also, the proceed signal from NICS was not a misrepresentation: the gun retailers' query regarding Kelley accurately came up empty.

In the Court's view, the Government is focused on the wrong "communication." If there were any transmission (or lack thereof) of information that would bring this case under the misrepresentation exception, it would be USAF's failure to communicate Kelley's history

that should have disqualified him from gun ownership, not the correct representation from NICS that nothing in its databases indicated Kelley could not purchase a gun. And at this stage, the former act skews closer to operational negligence—rooted in failure to collect and process information that should have been in its possession—than to communicational failure. Thus, the misrepresentation exception does not bar Plaintiffs' claims.[5]

ii. Brady Act Immunity

The Court next turns to a provision of the Brady Act that immunizes from liability certain participants in the background-check system.

This provision states:

> Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages . . . for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section.

18 U.S.C. § 922(t)(6).

[5] Plaintiffs also argue that *Block* and other cases signal that the misrepresentation exception applies to commercial injuries, not personal injuries like those complained of here. Docket no. 44 at 35. For example, *Block* states the exception applies only when the action fits a misrepresentation claim as commonly defined, which "has been confined very largely to the invasion of interests of a financial or commercial character, in the course of business deadlines." 460 U.S. at 296 n.5; *see also Saraw Partnership*, 67 F.3d at 571 (citing *Mundy v. U.S.*, 983 F.2d 950 (9th Cir. 1993), for the proposition that the Government is not liable "for injuries resulting from commercial decisions made in reliance on government misrepresentations"). The Government, however, cites several cases that apply the exception outside the commercial context. Docket no. 45 at 32 (citing, e.g., *In re FEMA Trailer Formaldehyde Products Liab. Litig.*, 713 F.3d 807 (5th Cir. 2013)). The case law is somewhat inconclusive on whether the exception is limited to commercial injury, and since in this case the exception is inapplicable on the operational negligence and reliance grounds, the Court declines to weigh in on this point.

1. The Brady Act, by its plain text, does not immunize the United States

First, the Government argues that this provision precludes this action against the United States, while Plaintiffs argue that the United States is not among the listed immunized entities, rendering this provision inapplicable in suits against the United States.

The Government's argument was adopted under similar circumstances in *Sanders v. United States*. 324 F. Supp. 3d 636 (D.S.C. 2018), *appeal pending*, No. 18-1931 (4th Cir.). The *Sanders* plaintiffs are victims and their relatives of another mass shooting carried out in a church: the murder by Dylann Roof of nine people in Charleston, South Carolina. *Id.* In that case, the plaintiffs sued the United States for the negligent acts of NICS employees. *Id.* The *Sanders* court held that the discretionary function barred the plaintiffs' claims, and as an alternative ground stated "it is obvious to the Court that a claim of negligence in the operation of the NICS system resulting in a prohibited person obtaining a firearm falls plainly within the scope of the Government's immunity." *Id.* at 649.

It is not so clear to this Court. The proper analysis seems to be two-fold.[6] First, does the Brady Act independently pull back some of the FTCA's broad sovereign immunity waiver in a suit against the United States? If not, the standard FTCA analysis applies, which the Court

[6] It would collapse this inquiry—in the Court's view, improperly—to follow the Government's proposed logical progression, which the *Sanders* court appears to have followed. That progression is: 1) Section 922(t)(6) immunizes federal employees; 2) the federal employees Plaintiffs allege acted negligently with respect to Kelley's information would be immune from this suit, had Plaintiffs brought it against them rather than against the United States; 3) the United States can use the defenses available to its employees; 4) and, thus, the United States is immune under Section 922(t)(6).

conducts below—namely, if the United States were a private person, would that person be liable in Texas under analogous circumstances?[7]

Here, the first question depends on the statutory text. In other words, is the Government correct that the United States is immune even though the immunity provision omits it from the listed immune entities? The Government argues that sovereign immunity is the default, and any waiver of that immunity must be set out clearly. Since "[o]nly the explicit inclusion of the United States in statutory language waives the government's sovereign immunity," the Government argues the United States need not be "listed in a statutory immunity provision to shield the government from liability." Docket no. 45 at 35.

Plaintiffs have the better of this argument, though, as they point out that the FTCA *is* the necessary immunity waiver. Congress has pulled back some of that waiver in specific statutes and has explicitly listed the United States where it has done so.[8] Under the negative-implication canon, "where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded." *United States v. Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

The plain language of the statute weighs against the Government's argument that the omission of the United States is meaningless. The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a

[7] In conducting this second inquiry, the Court applies state law, and any defense available to that private person under state law is available to the United States.

[8] *See, e.g.*, 46 U.S.C. § 4704 ("The United States, and any officer or employee of the United States is not liable to an owner or operator for damages resulting from removal of an abandoned barge under this chapter."); 18 U.S.C. § 3771 ("Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages."); 10 U.S.C. § 806b ("Nothing in this section (article) shall be construed . . . to imply any duty or obligation to any victim of an offense under this chapter or other person for the breach of which the United States or any of its officers or employees could be held liable in damages.").

statute what it says there[,]" and "[w]hen the words of a statute are unambiguous . . . this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Here, the Brady Act is unambiguous in specifying the people and entities immune from liability in providing information to NICS, and the United States is not listed.

This conclusion is reinforced by the people and entities the statute *does* list: local governments and employees of federal, local, and state governments. If, as the Government argues, it was unnecessary to list the United States because federal employees were listed, that would make redundant the listing of both local governments *and* employees of local governments. Under the construction doctrine *expression unius est exclusion alterius*, "to express or include one thing implies the exclusion of the other, or of the alternative." *Texas v. United States*, 809 F.3d 134, 182 n.182 (5th Cir. 2015). This applies "only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). It does not apply "unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Id.* Here, it is fair to suppose Congress considered listing the United States among the immunized entities, and this inference lends support to the Court's conclusion.

Since Congress chose not to include the United States in the list of immunized entities, the Brady Act immunity provision can only operate to the Government's benefit here if the United States can avail itself of its employees' immunities under federal law.

2. The United States is not immune simply because its employees are immune

The Government cites *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001), for the proposition that "the United States is entitled to avail itself of any defenses its agents could raise in their individual capacities." Docket no. 28 at 38. In *Alfonso v. United States*, the Government notes, the United States defeated an FTCA action by invoking a provision of Louisiana law that shielded state agents from liability arising out of emergency preparedness activities. 752 F.3d 622.

But "[a]s immunities and defenses are defined by the same body of law that creates the cause of action, the defenses available to the United States in FTCA suits are those that would be available to a private person under the relevant *state law*." *Vidro v. United States*, 720 F.3d 148, 151 (2d Cir. 2013) (emphasis added). Plaintiffs note that this "flows directly from the FTCA's text, which states that the Government stands in the shoes of a private state-law defendant and is liable—or not—'in accordance with the law of the place where the act of omission occurred.'" Docket no. 44 at 48. And since in *Alfonso* and *Medina* the United States claimed state-law defenses, these cases do not show that the United States can here claim an immunity granted to its employees by federal law.

What these cases show is that the United States, when standing in the position of a private person under the FTCA, can use any state-law defenses available to that person. Among these defenses are, where applicable, the argument that federal statute preempts certain types of state tort claims.[9] It is also made explicit in the FTCA that the United States

[9] This is shown by the cases the Government cites in reply. In *Avery v. United States*, a Fair Credit Reporting Act preclusion provision—which precluded negligence actions against "any person who furnished information to a consumer reporting agency" unless there is "malice of willful intent"—was "fatal to Plaintiffs' negligence claim,

can invoke "judicial or legislative immunity" available to its employees. 28 U.S.C. § 2674. This refers to "the traditional immunities that have long protected the key functions of the legislative and judicial branches of the Government," H.R. Rep. No. 100-700, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5948, not congressional grants of immunity directed at specific individuals or circumstances. It does not follow, then, that a statutory immunity provision shielding government employees from liability—and failing to immunize the federal government—can be invoked as a defense under state law. No case cited by the United States or revealed in the Court's research holds this.

The *Sanders* court stated—and the Government appears to argue here—that "Congress's clear intent in enacting § 922(t)(6) was to prevent any assumption of monetary liability for the operation of the background check system." 324 F. Supp. 3d at 640. If this were so, however, Congress could have stated as much. Instead, the Brady Act contains other precisely defined immunities beyond that discussed here. *See* 18 U.S.C. § 922(s)(7) (immunizing, in the waiting-period provision, "[a] chief law enforcement officer or other person responsible for providing criminal history background information"). This is not indicative of a blanket immunity against all liability related to the background check system.

The position that Congress intended to immunize the United States in roundabout fashion through a grant of immunity to federal employees rather than immunizing the United States directly lacks satisfactory support. The statute includes tailored grants of immunity—none of which fit the United States—and the doctrine cited by the Government focuses on

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because such a claim against a private individual would be preempted by" the statute. Docket no. 45 at 36 (citing 534 F. Supp. 2d 40, 24 (D.D.C. 2008). In *Sobel v. United States*, a Health Care Quality Improvement Act preclusion provision—which limits damages for a VA internal professional review body and dictates a presumption of immunity—ended an FTCA claim because the plaintiff's allegations did not overcome the presumption of immunity. *Id.* (citing 571 F. Supp. 2d 1222, 1229).

state-law defenses. Thus, the Court holds that the unavailability of suit against federal employees directly does not confer immunity on the United States in this FTCA action.

3. Even if the United States is immune, the Act cabins immunity to those 'responsible for providing information'

Even if the Government could avail itself of its employees' immunity, this provision states that it applies to those federal employees "responsible for providing information" to NICS. If applicable here, it would immunize the United States for some of its allegedly negligent conduct, but not all. Had Congress intended to completely immunize those covered by the provision, it would have omitted this "responsible for providing information" qualifier.

In arguing that § 922(t)(6) is a total bar to Plaintiffs' claims, the Government focuses only on the alleged acts related to the transmission of fingerprint cards and criminal incident data to the FBI's background check system. The Government does not grapple with the other alleged negligence. For example, Plaintiffs allege the USAF failed to: collect fingerprints and criminal incident data from and about Kelley; submit this information to DOD; train and supervise employees in properly collecting and submitting this information; and correct these problems despite a promise to do so following the Inspector General report. Further, in addition to DOD's failure to transmit Kelley's information to the FBI, they allege DOD failed to: follow policies and procedures regarding the collection and transmission of fingerprint cards and criminal history data and correct wrong or incomplete database entries.

Not every federal employee responsible for these alleged acts—including collection, supervision, training, and processing—is "responsible for providing information" to NICS. Under no circumstances, then, does the Brady Act immunity provision end these cases, as the Government claims. Further, at this stage the individual employees (whose defenses the

Government attempts to invoke on its own behalf) are not known by name. This is not a pleading deficiency—those in the position of Plaintiffs cannot be expected to know with specificity USAF's internal delegation of responsibilities and where in that chain the missteps occurred. Determining which employees' responsibilities fall under this immunity provision and which do not would require the benefit of discovery and would be better addressed at summary judgment or trial. Thus, even if the Government *could* invoke this provision—and the Court holds above that it cannot—disposition under 12(b)(1) would be inappropriate.

iii. Plaintiffs' Claims

Having ruled that neither the misrepresentation exception nor the Brady Act's immunity provision bars Plaintiffs' claims, the Court turns to Plaintiffs' legal theories. Under the FTCA, the United States is liable in tort for "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). That place is, in this case, Texas. Docket no. 28 at 22 n.32 (explaining that while Kelley was stationed in New Mexico during his court martial, New Mexico's choice of law rules indicate Texas law applies because it was the place of the last injury and where the last critical event occurred).

The test is whether a private person would be responsible for similar negligence under the law of the State where the acts occurred." *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957). But "like circumstances" does not mean "same circumstances," *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955), and "a court's job in applying the standard is

to find the most reasonable analogy," *In re FEMA Trailer Formaldehyde Prods. Liab. Litig. ("FEMA Trailer I")*, 668 F.3d 281, 288 (5th Cir. 2012).

However, "the FTCA was not intended to redress breaches of federal statutory duties." *Johnson v. Sawyer*, 47 F.3d 716, 727 (5th Cir. 1995) (quoting *Sellfors v. United States*, 697 F.2d 1362, 1365 (11th Cir. 1983)). "[T]he FTCA's 'law of the place' requirement is not satisfied by direct violations . . . of federal statutes or regulations standing alone. . . . The alleged federal violations also must constitute violations of duties 'analogous to those imposed under local law.'" *Id.* (quoting *Chen v. United States*, 854 F.2d 622, 626 (2d Cir. 1988)). Put another way, the FTCA "simply cannot apply where the claimed negligence arises out of the failure of the United States to carry out a [federal] statutory duty in the conduct of its own affairs" or where the claim "depends entirely upon Federal statutes." *United States v. Smith*, 324 F.2d 622, 624-25 (5th Cir. 1963). "This is not to say that the required state law must be one directly applicable to the conduct of federal employees or to the precise activity from which the claim arose." *Johnson*, 47 F.3d at 728.

As to negligence *per se*, courts have "generally refused to find the necessary state law *duty* in an assertedly violated federal statute or regulation merely because the law of the relevant state included a general doctrine of negligence *per se*." *Id.* at 728-29 (emphasis in original). "Duties set forth in *federal* law do not, therefore, automatically create duties cognizable under *local tort law*. The pertinent question is whether the duties set forth in the federal law are analogous to those set forth in local tort law." *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1158 (D.C. Cir. 1985).

> Where a claim is wholly grounded on a duty imposed by an allegedly violated federal statute or regulation, to allow FTCA recovery merely on the basis of a general state doctrine of negligence *per se*, without requiring that

> there be some specific basis for concluding that similar conduct by private persons or entities would be actionable under state law, is to in essence discriminate against the United States: recovery against it is allowed, although for similar conduct the private person or entity would not be subject to liability under state law.

Johnson, 47 F.3d at 729. Further, the Fifth Circuit has "long followed the principle that we will not create 'innovative theories of recovery or defense' under local law, but will rather merely apply it 'as it currently exists.'" *Id.* (quoting *Galindo v. Precision American Corp.*, 754 F.2d 1212, 1217 (5th Cir. 1985)).

Plaintiffs allege the United States breached its civil statutory duty to collect, process, and submit Kelley's background information into the national background-check system. The question here is whether Texas law provides any reasonable analogy to this duty. The Court will analyze in turn each of Plaintiffs' three claims—negligence *per se*, negligent undertaking, and negligent training and supervision.

1. Plaintiffs do not state a viable claim negligence *per se* based on violation of the Brady Act

First, Plaintiffs allege the United States violated the Brady Act and claim that this violation establishes negligence *per se* under Texas law. A negligence cause of action has three elements: (1) a legal duty, (2) breach of that duty, and (3) damages proximately caused by the breach. *See Praesel v. Johnson*, 967 S.W.2d 391, 394 (Tex. 1998). Negligence *per se* is a tort concept under which "a legislatively-imposed standard of conduct is adopted by the civil courts as defining the conduct of a reasonably prudent person." *Carter v. William Sommerville & Son, Inc.*, 584 S.W.2d 274, 278 (Tex. 1979); *Johnson v. Enriquez*, 460 S.W.3d 669, 673 (Tex.App.–El Paso 2015, no pet.).

The parties hotly dispute the applicable test for negligence *per se*. It is beyond dispute, however, that every negligence *per se* case begins with two threshold questions: whether the plaintiff belongs to the class that the statute was intended to protect and whether the plaintiff's injury is of a type that the statute was designed to prevent. *Praesel*, 967 S.W.2d at 395. Beyond that, the parties contest whether a penal statute is required, whether different inquiries govern civil and criminal statutes, and whether the Court must apply the factors set out in *Perry v. S.N.*, 973 S.W.2d 301, 305 (Tex. 1998).[10]

Here, however, the Court finds resolution of these issues unnecessary. For purposes of this motion, the Court assumes that *Praesel* provides the proper (and sole) test in this case, as Plaintiffs claim. The first two factors—the right type of injury and the right class of plaintiff—appear clearly met, as the Brady Act aims to protect the general public against gun violence. Further, despite the Government's argument that negligence *per se* requires a penal statute and that the Brady Act is non-penal as applied to the United States, the Court assumes the Texas negligence *per se* doctrine's scope could reach the Brady Act.

Crucially, however, the *Praesel* court imposes a third requirement: whether the alleged conduct would be considered substandard even in the absence of a statute. 967 S.W.2d at 395

[10] In *Perry*, the Court stated that if the threshold questions are satisfied, courts must still determine whether it is appropriate to impose tort liability for violations of the relevant regulations. *See Perry*, 973 S.W.2d at 306. The *Perry* court listed five factors to consider in doing so:

> (1) whether the regulations are the sole source of any tort duty from the defendant to the plaintiff or merely supply a standard of conduct for an existing common law duty; (2) whether the regulations put the public on notice by clearly defining the required conduct; (3) whether the regulations would impose liability without fault; (4) whether negligence per se would result in ruinous damages disproportionate to the seriousness of the regulatory violation, particularly if the liability would fall on a broad and wide range of collateral wrongdoers; and (5) whether the plaintiff's injury is a direct or indirect result of the violation of the regulations.

Omega Contracting, Inc. v. Torres, 191 S.W.3d 828, 840 (Tex. App.—Fort Worth 2006, no pet.) (citing *Perry*, 973 S.W.2d).

(citing *Parrott v. Garcia*, 436 S.W. 2d 897, 899 (Tex. 1969)). This element requires consideration of whether there is a corresponding common-law duty that is congruent with the statutory duty. Similarly, the *Perry* court, as one factor useful for deciding whether it is appropriate to impose tort liability for a given statutory violation, asked "whether the statute is the sole source of any tort duty from the defendant to the plaintiff or merely supplies a standard of conduct for an existing common law duty." *Perry*, 973 S.W.2d at 309.

This is because "the defendant in most negligence per se cases already owes the plaintiff a pre-existing common law duty to act as a reasonably prudent person, so that the statute's role is merely to define more precisely what conduct breaches that duty." *Id.* at 306; *see also Allen v. Wal-Mart Stores, LLC*, No. CV H-16-1428, 2017 WL 978702, at *12 (S.D. Tex. Mar. 14, 2017), *aff'd sub nom., Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170 (5th Cir. 2018) ("Usually, . . . when [Texas courts] consider whether to use a statute for tort liability, a duty previously exists under common law, so the court turns to the statute to establish the specific standard of care.") (citing *Parrott*, 436 S.W. 2d at 899-900).

The Texas Supreme Court "has created a new duty by applying negligence per se on only one occasion." *Perry*, 973 S.W.2d at 307 (citing *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549 (Tex. 1985)). But the *Perry* court stated that in the Texas Supreme Court's "next major negligence per se case" after *Nixon*, which was *El Chico Corp. v. Poole*, 732 S.W.2d 306, 309 (Tex. 1993), "we returned to the norm of deriving duty from the common law and looking to the statute only for the standard of conduct." *Id.*

Here, there is no general Texas common-law duty that corresponds with the Brady Act's reporting requirements, as there is "generally no duty to protect another from the

criminal acts of a third party or to come to the aid of another in distress." *See Perry*, 973 S.W.2d at 306 (citing *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983)). This lack of common-law duty is fatal to Plaintiffs' negligence *per se* claims under Texas law and in the FTCA context. The Court must be mindful of its role in a case like this.

First, as the Fifth Circuit stated in *Wentwood*, federal courts must make an "*Erie* guess" about how the Texas Supreme Court would answer a novel negligence *per se* question. *Wentwood Woodside I, LP v. GMAC Commercial Mortg. Corp.*, 419 F.3d 310, 323 (5th Cir. 2005). Texas courts have already considered whether gun dealers can be negligent *per se* by violating § 922,[11] but this Court must still ask whether the statute's reporting aspects—as opposed to its point-of-sale aspects—can support Texas negligence *per se* liability. And given the lack of congruent common-law duty and the Texas Supreme Court's reluctance to create new ones, the Court's *Erie* guess is that the Texas Supreme Court would not establish a new duty here. This is so even when working under the presumption that Plaintiffs' test is the correct one. As stated above, the Court applies Texas law as it exists, but it will not import innovative theories of recovery or otherwise expand Texas tort law.

Second, the lack of common-law duty puts Plaintiffs' claims at odds with the edicts in *Johnson* and other FTCA cases. Without an analogous state-law duty, this claim is "wholly grounded on a duty imposed by an allegedly violated federal statute" without a "specific basis for concluding that similar conduct would be actionable under state law[.]" *Johnson*, 47 F.3d

[11] *See Reyna v. Academy Ltd.*, No. 01-15-00988-CV, 2017 WL 3483217, at *4–7 (Tex. App.—Houston [1st Dist.] Aug. 15, 2017, no pet. h.) (recognizing violation of § 922 may constitute negligence per se); *Wal-Mart v. Tamez*, 960 S.W.2d 125, 128 (Tex. App.—Corpus Christi 1998, pet. denied) (same); *Bryant v. Winn-Dixie Stores, Inc.*, 786 S.W.2d 547, 548–550 (Tex. App.—Fort Worth 1990, writ denied) (same); *Peek v. Oshman's Sporting Goods, Inc.*, 768 S.W.2d 841, 844 (Tex. App.—San Antonio 1989, writ denied) (same); *Ellsworth v. Bishop Jewelry and Loan Co.*, 742 S.W.2d 533 (Tex. App.—Dallas 1987, writ denied) (same).

at 729. The most that can be said is that 1) the United States allegedly violated the Brady Act, 2) Texas has a negligence *per se* doctrine, and 3) Texas has applied this doctrine to the Brady Act in gun-dealer cases. This is not enough.

Thus, because Plaintiffs have pointed to no "analogous circumstances" under which Texas law imposes the necessary duty to support the negligence *per se* claims and because the FTCA is unavailable where "[t]he existence or nonexistence of the claim depends entirely upon Federal Statutes,"[12] the Government's motion is granted as to the negligence *per se* claims.

2. Plaintiffs state a valid negligent undertaking claim under Texas law

Still, "notwithstanding their inability to support an FTCA suit, federal statutes and regulations can still be important." *Zelaya v. United States*, 781 F.3d 1315, 1324–25 (11th Cir. 2015). For example, they "may provide evidence that the government has assumed duties analogous to those recognized by local tort law" or "may provide the standard of care against which the government's conduct should be assessed." *Id.* (quoting *Art Metal*, 753 F.2d at 1158-59)). "In short, while a federal employee's breach of a federally-imposed duty may bolster a FTCA claim, it cannot, on its own, create the duty that gives rise to that claim. That task falls to the applicable state jurisdiction." *Id.*

Here, Plaintiffs allege that the United States is liable for negligent undertaking. As *Zelaya* further explains, in FTCA cases,

> [w]hen the complaint involves one of the "garden variety common law torts," th[e] requirement of a state tort cause of action can be easily met. . . . Difficulties arise, however, when the activities at issue are "uniquely governmental functions" with unique duties that suggest no obvious analogue

[12] *Johnson*, 47 F.3d at 728 (quoting *United States v. Smith*, 324 F.2d 622, 624-25 (5th Cir. 1963)).

> among private actors. *Indian Towing Co. v. United States*, 350 U.S. 61, 64, 76 S.Ct. 122, 100 L.Ed. 48 (1955). Without question, it can be difficult to imagine how a private person could be liable for breaches of such quintessentially governmental functions as the regulation of air travel, prisoners, drugs, and livestock because no private person has such duties under state law. *See, e.g.*, *Smoke Shop, LLC v. United States*, 761 F.3d 779, 780 (7th Cir. 2014) (drug enforcement regulations); *Alfrey v. United States*, 276 F.3d 557, 559 (9th Cir. 2002) (regulation of prison inmates); *Dorking Genetics v. United States*, 76 F.3d 1261, 1262 (2d Cir. 1996) (cattle inspections); *Howell v. United States*, 932 F.2d 915, 916 (11th Cir. 1991) (airline safety regulations).
>
> Notwithstanding these conceptual difficulties, the Supreme Court long ago made clear that there is no exception from FTCA liability solely because the particular tort arose from the performance of uniquely governmental functions. *Indian Towing*, 350 U.S. at 64, 76 S.Ct. 122. . . . We have recognized that "[n]ormally, the most analogous approach in determining whether the government is liable in the regulator-enforcer context under state law is the [G]ood [S]amaritan doctrine." . . . . Thus, in cases where the plaintiff points to the violation of a federal statutory or regulatory duty, we generally look to the applicable state's Good Samaritan doctrine to decide if the plaintiff has alleged a state tort claim that satisfies the § 1346(b)(1) requirement and thereby opens the door for a claim under the FTCA.

Zelaya, 781 F.3d at 1324–25.

As the Second Circuit stated in *Ingham v. Eastern Air Lines, Inc.*, "[i]t is now well established that when the government undertakes to perform services, which in the absence of specific legislation would not be required, it will, nevertheless, be liable if these activities are performed negligently." 373 F.2d 227, 236 (2d Cir. 1967).

The Government also cites this passage, apparently for the proposition that if the governmental service is prescribed by statute it is not a voluntary undertaking under the Good Samaritan doctrine. Docket no. 45 at 24. The Government misunderstands the sentence. *Ingham* is stating that even if the only reason the Government acts is because of legislation, it still cannot act negligently. *See also Alfrey v. United States*, 276 F.3d 557, 568–69 (9th Cir. 2002) ("Once a decision to investigate inmate threats has been made, however, and that

investigation initiated, there is a legitimate expectation that the investigation will be conducted with due care. Both the Supreme Court and this court have long distinguished between the government's decision to act or provide a service, and the (negligent) performance of that act or service."). The *Ingham* passage's meaning is made clear in the subsequent passage, as the court engages in a thought exercise:

> Assuming arguendo, that in the absence of FAA regulations approach controllers would not have to advise incoming aircraft of weather conditions, the decision to provide such information would lead carriers and their pilots normally to rely on the government's performance of that service. The carriers, relying on the FAA to keep their pilots informed of current weather conditions, would be likely to reduce both the quantity and quality of their own weather reporting. In light of this reliance, it is essential that the government properly perform those services it has undertaken to provide albeit voluntarily and gratuitously.

373 F.2d at 236.

The Good Samaritan doctrine, or negligent undertaking, is established in Texas law, which generally imposes no duty to act in preventing harm to others. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837 (Tex. 2000). Even so, a duty to use reasonable care may arise "when a person undertakes to provide services to another, either gratuitously or for compensation." *Id*. Texas courts rely on the Restatement formulation, which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Id. (quoting Restatement (Second) of Torts § 323 (1965)).

In deciding the duty element of a negligent undertaking theory, courts must ask whether a defendant acted in a way that requires the imposition of a duty where one otherwise

would not exist, *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013) (per curiam), considering "several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the defendant's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant," *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990).

Here, Plaintiffs allege the United States, in undertaking to establish a complex national background-check system, assumed the duty not to operate this system negligently. Further, Plaintiffs argue, even if negligently running the background check system is not an undertaking under Texas law, the USAF's volunteering to take corrective action and failing to do so does constitute such an undertaking. Although these allegations could not support a negligence *per se* claim, violation of these duties imposed by statute and regulation provide evidence that the United States have voluntarily assumed a duty, as recognized by Texas common law.

First, applying the *Phillips* factors, the Court must decide the duty element. The risk, foreseeability, and likelihood of injury are high. Gun violence generally and mass shootings specifically are tragically commonplace. To limit this violence, Congress has disqualified certain people from buying, owning, or possessing guns and established a national background check system to prevent these people from obtaining guns. With Kelley specifically, at every stage in his life—during and after his USAF tenure—the threat of violence loomed. People like Kelley cannot own guns and the negligent operation of the background check system foreseeably increased the risk and likelihood of injuries like those suffered by Plaintiffs.

The social utility of USAF's and DOD's conduct is high, but the magnitude of guarding against the injury and the consequences of placing this burden on the United States are low. The United States, of all possible entities, is best positioned to carry out the NICS system effectively and has the resources to absorb the blow when, as here, it allegedly acts negligently and faces the prospect of damages for that negligence. Taken together, these factors lead the Court to conclude that the United States owed a duty in this case. Had the Government elected to provide this service even without a statute requiring it, the United States would also, in that case, assume this duty.

Another court in the Western District of Texas recently denied summary judgment in an FTCA case stemming from another mass shooting the Government should allegedly have prevented—the 2015 Fort Hood shooting. *Kristensen v. United States*, No. 1:17-CV-126-DAE, 2019 WL 1567908 (W.D. Tex. Jan. 31, 2019). In that case, the court found that the plaintiffs had a negligent undertaking claim, locating the duty in "Army and Department of Defense regulations" that was "voluntarily assumed by affirmative conduct—enacting the regulations and acting under color of them." *Id.* The *Kristensen* decision supports this Court's conclusion. Similarly, here, in enacting the DOD regulations mandating that information be collected and reported to NICS, the Government assumed a duty to act non-negligently in doing so. And when USAF promised to adopt the IG report's recommendations and fix its systemic problems, it re-affirmed this assumption of duty.

With the duty element satisfied, Plaintiffs easily satisfy the remaining elements. Importantly, Plaintiffs' reliance is not required here. Many arguments like Plaintiffs' fail because, in casting an argument in terms of a state's Good Samaritan doctrine, plaintiffs often

run into the misrepresentation or discretionary-function exceptions. Not so here. As held above, Plaintiffs relied on no governmental representation or failure to communicate, which prevents application of the misrepresentation exception. This would pose a problem under a Good Samaritan doctrine that requires reliance on the voluntary undertaking, but Texas's does not. It requires either reliance or an increased risk of harm. And despite the Government's argument to the contrary, Plaintiffs allege the systemic negligence on the Government's part led to a background check that was botched many times over, and the result was that Devin Kelley bought guns he should have been disqualified from buying. He used those guns to kill Plaintiffs' family members. This is a sufficient allegation of increased risk of harm. Besides, this is a factual question, as is whether the Government should have known of a danger to Plaintiffs arising from its alleged negligence.

Further, referring to the above discussion of the Brady Act immunity provision, the alleged negligent undertaking—enacting and acting under color of regulations that require DOD and USAF to collect, handle, process, and report information to the background check system—implicates the conduct of employees well beyond those "responsible for providing information" to NICS. Even if the United States were immune to the extent its employees are immune, then, the negligent undertaking claim would still survive. The United States would still have assumed the duty to act non-negligently with respect to the background check system, and it would still have breached this duty by, for example, failing even to collect Kelley's fingerprints. This act and other alleged acts have nothing to do with "providing information" to NICS.

Thus, Plaintiffs' claim for negligent undertaking under Texas law should proceed.

3. Plaintiffs state a valid claim for negligent training and supervision

Finally, Plaintiffs bring claims for negligent training and supervision. "The elements of a claim for negligent supervision, like all negligence claims, are (1) the defendant owed a legal duty to the plaintiff, (2) the defendant breached that duty, (3) the plaintiff suffered damages, and (4) the damages were proximately caused by the defendant's breach." *Latimer v. Mem'l Hermann Hosp. Sys*., No. 14–09–00925–CV, 2011 WL 175504, at *3 (Tex. App.—Houston [14th Dist.] Jan. 20, 2011, no pet.) (citation omitted). "To prevail on a claim for negligent hiring or supervision, the plaintiff is required to establish not only that the employer was negligent in hiring or supervising the employee, but also that the employee committed an actionable tort against the plaintiff." *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 801 n. 2 (Tex. 2010) (quoting *Brown v. Swett & Crawford of Tex., Inc*., 178 S.W.3d 373, 384 (Tex. App.—Dallas 2005, no pet.)).

Claims against an employer for negligently hiring, supervising, training, or retaining an employee are based on direct liability, not on vicarious liability. *Soon Phat, L.P. v. Alvarado*, 396 S.W.3d 78, 100-01 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). "Negligent hiring, retention, and supervision claims are all simple negligence causes of action based on an employer's direct negligence rather than on vicarious liability." *Dangerfield v. Ormsby*, 264 S.W.3d 904, 912 (Tex. App—Fort Worth 2008, no pet.) An employer has a duty to adequately hire, train, and supervise employees and "[t]he negligent performance of those duties may impose liability on an employer if the complainant's injuries are the result of the employer's failure to take reasonable precautions to protect the complainant from misconduct of its

employees." *Mackey v. U.P. Enterprises, Inc.*, 935 S.W.2d 446, 459 (Tex. App.—Tyler 1996, no pet.).

The Government argues only that because there is no actionable tort against a federal employee, these claims cannot survive. But, as held above, Plaintiffs have stated an actionable tort for negligent undertaking. Although not styled as a claim against an employee, it is based on the negligence of federal employees. Plaintiffs allege that federal employees negligently collected, processed, and reported background information—if they can prove that this negligence was proximately caused by negligent supervision or training, the Government would be liable under a negligent training or supervision theory.

This claim is better addressed at summary judgment or trial, as discovery will reveal whether Plaintiffs meet the necessary elements. For now, based on the information reasonably available to Plaintiffs, the complaint states a valid negligent training and supervision claim.

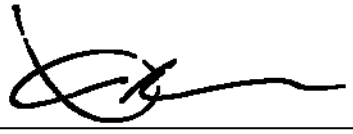
3. Conclusion

Accordingly, the Government's Motion to Dismiss is GRANTED IN PART and DENIED IN PART. Plaintiffs' negligence *per se* claims are DISMISSED. Plaintiffs' negligent undertaking claim and negligent training and supervision claims will proceed. To the extent any of the consolidated complaints do not include one or more of these claims, those complaints are DISMISSED WITH LEAVE TO AMEND. Should those plaintiffs wish to pursue their claims, they must file an amended complaint by June 6, 2019.

Discovery in this case was stayed pending resolution of this motion. This stay is LIFTED and the parties are now DIRECTED to confer and submit a proposed scheduling order and Rule 26(f) report by June 13, 2019.

It is so ORDERED.

SIGNED this 23rd day of May, 2019.



XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE